MISSISSIPPI LAW JOURNAL

LUCY SOMERVILLE HOWORTH 1895-1997 - A MEMORIAL

THE JAMES MCCLURE MEMORIAL LECTURE IN LAW

Delivered by *Senator Thad Cochran,* October 13, 1997

THE GREAT DISSENTERS: PARALLEL CURRENTS IN HOLMES AND SCALIA

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LUCY SOMERVILLE HOWORTH
1895-1997

On August 18, 1920, Lucy Somerville watched from the gallery of the Tennessee statehouse in Nashville as Tennessee became the 36th state to approve the 19th Amendment to the United States Constitution, thus assuring ratification of the amendment securing forever women's right to vote. She was 25 years old. She would later spend her career in public and private life championing the cause of women's rights.

Lucy Somerville was born in Greenville on July 1, 1895, the daughter of Robert and Nellie Nugent Somerville. She came from a long line of lawyers and from an early age aspired to be a lawyer, even though that was not the polite thing for young ladies to do. Her mother was a women's rights activist herself and took young Lucy to suffragist meetings and inspired in her daughter an independent spirit. Lucy's mother was the first woman to be elected to the Mississippi Legislature, where Lucy also served in the 1930s.

Lucy Somerville graduated from Randolph-Macon Woman's College in 1916 with a major in political science. Having earned Phi Beta Kappa honors, she spent the next year as a teaching assistant at Randolph-Macon and then studied international law at Columbia University the following year.

She then returned to her native state to study law at The University of Mississippi School of Law, where she graduated at the top of her class in 1922. Graduating first in her class entitled her to give the commencement address, which we are pleased to present in its entirety here as a fitting memorial to her lifetime of service in the public and private practice of law and to her long service in pursuing equality under law for women. In her commencement address, as you will note, she chides then Chancellor Powers for urging students to go home

and tell their parents that Darwinistic ideas of evolution were not being taught or discussed on the Ole Miss campus.

Samuel M. Davis
Dean of the
University of Mississippi
School of Law

INTELLECTUAL INTEGRITY AND COLLEGE EDUCATION[*]

Lucy R. Somerville
University of Mississippi
May 29, 1922

In the almost sylvan quiet of this campus, within the walls of this historic room in which many generations of commencement orators have spoken, it is difficult to speak of the disagreeable things of life. It would be pleasanter for us all, perhaps, if I should repeat a few saccharine platitudes and take my seat. But America, and Mississippi especially, have had enough of that. Our English friends come and make graceful speeches to us, chautauqua lecturers discuss gravely and ponderously superficial problems of the day, and we go to hear them, go gladly, and come away with a feeling of smug satisfaction, nodding and saying, "that's true." But if ever anyone undertakes to destroy any of the illusions of our 100% Americanism we brand him as a "foreigner" or a "damyankee" and retreat behind our stolid sophistries. We have built out of slogans and meaningless phrases and armor that renders us as impervious to criticism as ever Achilles was to Trojan arrows.

We have been told in throbbing, sobbing tones, that the need of America is for men, we were told, not so long ago, that greater production of economic goods would cure the festering sores of our social structure; now we are told that over-production is one of the causes of these stores. Such foolish twaddle will be served to us until the real need of America is met, that

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[*] The following pages are the full text of the speech given by Lucy R. Somerville, a candidate for the LL.B. degree, at Commencement, 1922.

need is for intellectual integrity, an honesty of soul which will face the world as it is, frankly and unafraid, and which will not lie to itself.

The colleges and universities, one would think, might supply that need. They taught war aims cheerfully during the war, and now in the same cheerful, unreasoning fashion, they teach peace aims; anything, in fact, that anyone asks for is willingly added to the curriculum. Why not teach the students to think? That, strange to say, is treated as a shocking, disturbing proposal.

In the troublous time of the middle ages, the first universities and colleges were founded by men like Abelard, and Thomas Aquinas, and Edmund Rich. Men "who had dedicated themselves to the pursuit of wisdom and understanding." They were "seekers in the realm of the spirit," they had the passion to seek and to impart. These first colleges were poor and small, but those who attended them were lovers of books and meditation, and curious inquiry. In time came endowments and buildings and organization and power, and a lessening of initiative and imagination, the college and university was then a place of fixed curriculum where the students followed a required course in Latin, Greek, moral philosophy, mathematics. It was definite, it was thorough. We need not dwell on this middle phase, for it like the first, belongs to the past; but one feature needs to be remembered: the teacher was master of his subject, and no committee either of bankers or of bricklayers told him how it should be taught.

In the last half-century the college of "liberal arts" has disappeared; in its place we have the modern university. Whether they have three hundred or thirty thousand students, these universities are like. They offer a potpourri of subjects from accounting to archaeology, they have the professional and vocational schools. They are big, there is a stir and bustle about them like that of a department store. The student learns when he first arrives that he must have a required number of units in a certain number of groups to get a degree, and the most he gets out of any course, if his conversation is any criterion, is two or three points, and at the end, a degree

which entitles him to a certificate to teach. All idea of culture, all efforts at real training of the intellect are taboo, and the only justification for a course is that it will help a student to earn his living. Imagination and initiative, which in the beginning lit the cloistered halls of the colleges are gone; in their place are politics and success. It is forgotten that the student must live, as well as earn his daily bread.

"It is now assumed," to quote one writer, "that the glory of a college finds expression in more buildings, more books, more laboratories and more students. To question this holy truth is heresy and treason." But some there are who would question it, some who doubt that the greatness of an educational institution lies only in size, some few who believe that the object of education is "to discipline the mind and to give to students a knowledge of their own souls." But they are only a still small voice in the midst of the rooters for the big university.

A little more than three hundred years ago, in 1600, Bruno was burned at the stake because he dared to say that the sun and not the earth was the center of the universe. And it is less than three hundred years since Galileo with the picture of the tortured Bruno before his eyes, knelt in the cathedral and recanted. Intellectual liberty, such as we have, has been dearly bought. The blood and tears of thousands of sensitive souls have watered the tree of liberty, and those who sit in its shade today seem unaware that the same forces of bigotry and intolerance that took joy and delight in the inequities of the inquisition are poisoning its roots again.

When the head of an institution of learning requests the students on going home to apologize and explain because an instructor in one of the sciences teaches that science according to the best of his knowledge, I, for one, respectfully refuse to thus betray the ideal of education. Are students to be fed bits of information as a baby is given its milk? Are they never to learn to discriminate the true from the false? Are they to get no sense of value? Will they always be taught that life and its problems are absolute and not relative? That is the way students are treated at present, and then some wonder that college graduates in a community fall for the first smooth talking

demagogue that appears. Why not? They have never had a choice between ideas in their lives. We Americans are becoming the most bigoted and intolerant people on the globe. That is bad, but what makes it worse is that we stand in the market place and pray the Pharisee's prayer, "Lord we thank Thee that we are not as other Nations are."

The "Merchant of Venice" was stricken from the curriculum of certain New Jersey schools because it offended the Jews. The Scotch, not to be outdone in patriotic fervor, then tried to have "Macbeth" taken out because it reflected on a noble Scotchman. The legislature of Kentucky very nearly adopted a bill prohibiting the teaching of evolution in the state schools. The general assembly of the Southern Baptist Church recently adopted a resolution calling for the rewriting of biology texts according to their own peculiar notions. The sum total of human knowledge has never been increased by papal encyclicals and it will not be by protestant resolutions. There is no choice in my mind between an index expurgatorius of the Roman Catholic Church and an index expurgatorius of the Southern Baptist Church. Soon it will be suggested that a committee be appointed in every county to decide what shall be taught by the professors in their respective departments and membership on this committee will be limited to those who have not gone beyond the sixth grade. Shall the English department stop insisting upon good English because a majority of the people speak bad English? Shall German be taken out because perchance, it was not spoken on the tower of Babel and Sanskrit be taken up instead? We call ourselves a free people, we stand and sing to the land of the free and the home of the brave, yet the restraint put upon the faculties of our institution may be compared to that which was the rule in Russia when the Czar was at the zenith of his power. This insistence upon strict conformity to the status quo is making mental cowards of us all.

In 1914 a professor of political science, in explaining the first ten amendments to the Constitution, known as the "Bill of Rights," stated to the class that though probably necessary in 1790, they were superfluous now, as such matters as free-

dom of speech, right of assembly and petition were taken for granted. In 1922, a congressional committee reporting on the activities of the Department of Justice is forced to condemn as "examples of inexcusably illegal violence" the raid and wholesale arrests of the Department in 1919 and 1920 and to characterize them as "the lawless acts of a mob," and in plain violation of the Fourth Amendment to the Constitution. And so we have cause to be grateful for that strange fear psychosis of our ancestors which led them to write into the Constitution these guarantees of our fundamental rights. But it does little good if the government can disregard them and if the only remedy of the injured is a congressional investigation two years after the wrong. There is a Bill of Rights in the Mississippi Constitution, it contains twenty-seven sections; is it to be merely a list of noble words, an array of fine phrases as meaningless as a copy of Milton in the hands of a savage South Sea Islander? "Eternal vigilance is the price of liberty," said one of the "founding fathers," as Mr. Harding delights to call them. While we bask in the sunlight of material well-being, the freedom to think is stolen from us. Name a subject, be it history, economics, science, politics, even literature, in which any deviation from the beaten path is not met with cries of "socialism," "bolshevism," "radicalism," and on the other extreme of "reactionary." As has been said, we have a word "socialism" and it makes us angry at others and satisfied with ourselves. We do not think. We hurl epithets; and this is the tragedy, the dishonestly; we call it thinking.

We call ourselves a democratic, law-abiding people. How many have analyzed that concept "democracy" and how many try to square that concept with our labor policy, if such it may be called, with the subsidized police of West Virginia, with our mobs, our lynchings, the Ku Klux Klan? This nation, which was one of the first to adopt the revolutionary republican government, now says to Russia, "we will have nothing to do with you until you establish a form of government that pleases us." If the Czar of Russia had said that in 1815 and again in 1860, we might not have been a nation today. What right have we to assume a self-righteous air and dictate to other nations

what they shall and shall not do with their own. America with its enormous wealth, its vast resources, its unlimited possibilities, its buoyant hopefulness, could be the spiritual leader of the world; instead, it is stifling any breath of intellectual life within itself and the colleges and universities actively assist in the smothering of such faint breaths as stir within their walls. "Somehow we do not have an interest in ideas as ideas, nor in science and art for what they may do in liberating and elevating the human spirit. Science and art as far as they refine and polish life, accord "culture," mark stations on an upward social road, and have direct, useful social applications; but as emancipations, as radical guides to life, they have no interest for our people or for our educators."

No one suggests that the university has to do with "the kingdom of the spirit, that beautiful realm which we have beheld from afar, and which those who seek after wisdom and understanding fain would enter and possess for themselves forever." And with relating that kingdom with the realities of life. Such an idea is an empty dream in the closed, stuffy, false atmosphere of a modern university. An student who harbors such an idea is dubbed "queer" and shunned by his fellows, and any professor who would teach such ideas is censured and sees his chair slipping from under him. You may say this is an exaggeration, that there is a shred of creative intelligence left in some of the institutions for the higher learning in America. Be honest for a few moments, think over your own experience, you may have studied under a master of syntax, but did you meet a master of life? There are a few notable exceptions, we would honor them. But read again the *Education of Henry Adams*, Professor Veblen's, *The Higher Learning in America*, the recently published autobiography of Ludwig Lewisohn, *Upstream*, and some of the many articles on the subject of university education in current magazines, from the foolish series by Calvin Coolidge to others more intelligent.

Some there are among us who hold that a benevolent autocracy is the best form of government, some who would distribute the vote according to the amount of property a citi-

zen owns, one vote for every ten thousand dollars probably, as if governments were instituted to accumulate gold. These persons are honest. Then there are those who would establish a dictatorship of the proletariat, and they too, are honest. But the great mass of our people do lip service to democracy and permit acts of autocracy to be done without ever a word of protest; they claim to be law-abiding and then break every law that it does not suit their convenience to observe. The mental dishonesty of this kind of thing is the most corrupting influence in our life. Slogans substituted for ideas have brought us to this pass. Students are not taught to evaluate, they are taught to condemn or to approve, never to understand. We worship in doggerel verse set to jazz, we sing illiterate, vulgar songs, listen to this one, it is typical:

> No use of talkin', No use of talkin'
> You'll start in dog walkin',
> No matter where, there's jazz copation,
> Blues modulation,
> Just like a Haitian,
> You'll rip and tear."

After singing songs like that our people cry "dago," "wop" at the Italian hod carrier in the street who sings the airs from *Rigoletto*. We want to "Americanize" him. To what? To singing the *Royal Garden Blues* instead of *La donna e mobile*? The mere word "Americanize" is not sufficient to dispose of that problem. A word cannot supply for all time the place of ideas. As expressed by Bertrand Russell, "So long as self-righteousness and an antiquated morality of disapproval govern the American outlook, self-deception will be easy and tyranny inevitable." That is the state in which we now are. That is the road upon which we are moving.

There are nearly four hundred thousand students in American colleges and universities. In them should be the nation's hope. They are, on the whole, earnest and well behaved, good to look upon and pleasant to associate with. But they are sent to college, or they send themselves with the

fixed determination to acquire there information which will better enable them to earn their living, to sharpen the tools with which they must carve a livelihood from a cold and hostile environment. This materialistic concept of education has stilled any faint stirrings in the minds of the students, and the windows of the soul are never opened for the wind to come into and blow them into life. Instead those windows are sealed with words without meaning, "conventionalized gestures of the mind." If an idea can be called "democratic" or "undemocratic," no one ever inquires further into its nature or import. Success is substituted for thought.

A citizen's first duty, to paraphrase Mark Twain, is not to his country, is not to his party, but to his honor, to the honor of his mind. The realm of ideas, the potential knowledge of mankind is a vast uncharted sea, and those who would like Columbus set sail, perhaps to discover another new world, should find in the universities a freedom to seek, a wider knowledge, a passionate love for the truth, and encouragement and assistance in making ready for the voyage. To adapt Aristotle, the origin of the university is that it enables us to live, its justification, that it enables us to live well. Truth, beauty, liberty, these are words full of grace. We have played with them too long, the time has come to treat them with reverence. And may it someday be possible for every student in American to sing, and to mean with all the intensity that his soul possesses:

> "Pilgrims on the starry road,
> March we up to the abode
> Of those spirits, pure and high,
> Who for truth, have dared to die."

THE JAMES MCCLURE MEMORIAL LECTURE IN LAW
Delivered BY SENATOR THAD COCHRAN
October 13, 1997*

Thank you. Thank you, Dean Davis. Thank you, Robert Khayat, my good friend and former classmate. Robert called and extended to me the invitation to deliver the James McClure Lecture, this very prestigious lecture, and I was flattered indeed. I'm well aware, of course, that the prestige is due to the eleven distinguished lecturers who have come to Ole Miss and addressed the law school since 1979 in this lecture series, and it also attaches because of the life and professional career and legacy of James McClure to whose memory this lecture is dedicated. So, I truly feel highly honored to be invited, and I will try very hard to measure up to the level of excellence you have every right to expect from one who is asked to speak to you under these circumstances.

I chose as the topic of this lecture, "The Senate's Special Role," which will challenge me to discuss the considerations that led the Framers of the Constitution to establish the United States Senate in the first place, the role they envisioned it would play, and the way in which it has functioned over the years in its effort to meet the expectations of its creators, and, more importantly, to serve the public interest.

I will undertake to do that by concentrating on the Senate's responsibilities as defined by the Constitution: to legislate; to confirm appointments; and to approve treaties. I

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* United States Senator for the State of Mississippi, 1978 to present. United States Representative, for the State of Mississippi, 1973 to 1978. B.A. 1959, J.D. 1965, University of Mississippi. Senator Cochran served as Articles Editor of the *Mississippi Law Journal* from 1964 to 1965. This text is a transcript of the lecture given by Senator Cochran on October 13, 1997 at the University of Mississippi School of Law.

expect there will be time remaining for questions if you want to ask them. If you do not want to ask about the Senate, I'll be glad to try to answer questions on other subjects.

I do have background information on some of your faculty if you want me to help you in that way. John Robin Bradley, Guff Abbott, and Bob Weems were all here when I was. Almost all of our law professors are now dead. Some of you may want to look forward to that situation if you are not happy with your grades or the way you have been treated in class. Your professors too will pass on some day.

One of the professors we had when I was here was William Joel Bunkley who had made all A's when he went through law school. I remember one day some of us were drinking coffee with him over at the Alumni House, and one of our fellow students said, "Mr. Bunkley, I can't believe you really made all A's when you went through law school and never even made a B. They must have graded different back then." Mr. Bunkley looked at this student right straight in the eye and he said, "Yeah, they did; they graded harder." We thought he was grading hard then, but he surely did after that.

Well, the role of the United States Senate, back to the subject at hand, is unique. The Framers of the Constitution debated longer and more intensely about the Senate than any other federal government institution. In the end they concluded that the Senate should be a select and deliberative legislative body whose responsibility would include the protection of the rights of the states through constitutional interpretation, confirmation of appointments, and treaty making. It was expected that the Senate might be in session for as much as six months in the year while the House of Representatives would be required to meet for only half that time.

The delegates at the Philadelphia Convention anticipated that the Senate would function as more than a legislative body. It was suggested by James Madison that the Senate should proceed "with more coolness, with more system, and with more wisdom than the popular branch." The Constitution, therefore, requires senators be at least 30 years old com-

pared to 25 in the House. The senators must be citizens of the United States for at least 9 years, two years longer than required for the House; and they were to be chosen by the governments of the states rather than by direct popular election.

In Federalist Number 63, Madison described the inherent limitations of the House of Representatives owing to its size and two-year term for members. "It is sufficiently difficult," he said, "to preserve a personal responsibility in the members of a numerous body for such acts of the body as have an immediate, detached, and palpable operation on its constituents." The remedy for this defect would be, according to him, and I quote: "An additional body in the legislative department which having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of these objects." The smaller size of the Senate, 26 members versus 65 in the House in 1789, and the six-year term, were characteristics designed to provide steadiness and continuity.

Madison also called attention to the value of having the Senate act as a restraint on democratic passions. At such moments, and I quote again: "How salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow mediated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind."

Delegate James Wilson supported bicameralism by noting that in a single House there is check but the inadequate one of the virtue and good sense of those who compose it.

Other safeguards were added to limit the opportunity for corruption and abuse in the Senate. One technique was the system of staggered terms with one-third of the senators elected every two years. To quiet concerns about centering too much power in the Senate, Wilson reminded his colleagues at the Philadelphia Convention that because one-third of the senators "would go out triennially, there would always be three divisions holding their places for unequal terms, and consequently acting under the influence of different views, and

different impulses."

Another mechanism for controlling the Senate consisted of selection of senators by state legislatures. Alexander Hamilton in Federalist Number 27 predicted, and I quote:

> Through the medium of the state legislatures—which are select bodies of men and which are to appoint the members of the national Senate—there is reason to expect that this branch will generally be composed with peculiar care and judgment; that these circumstances promise greater knowledge and more extensive information in the national councils, and that they will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill-humors, or temporary prejudices and propensities, which in smaller societies, frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes which, though they gratify a momentary inclination or desire, terminate in general distress, dissatisfaction, and disgust."

Consistent with this system of election, state legislatures frequently "instructed" their senators how to vote on specific issues. The practice of instruction continued throughout the nineteenth-century with varying degrees of compliance.

Of course, reliance on state legislatures to elect senators came to an end in 1913 with the ratification of the seventeenth Amendment, which provided for direct popular election, but the fact that each state is represented with equal numerical influence in the Senate and that many governors and other state officials wind up serving in the Senate, the close relationship between senators and their state governments has endured over the years.

In his famous commentaries on the Constitution, Joseph Story praised the law-making process designed by the Framers. He said that no system of government could be more admirably contrived to ensure due deliberation and inquiry and just results in all matters of legislation. No law could be passed without the concurrence first of the majority of the people and then a majority of the states. This principle of bicameralism is thus a part of our system of checks and balances.

Story cautioned that

> the disease most incident to free government is the facility and excess of lawmaking; and while it never can be the permanent interest of either branch to interpose any undue restraint upon the exercise of all fit legislation, a good law had better occasionally fail rather than bad laws be multiplied with a heedless and mischievous frequency.

As Justice Story also observed, the senatorial check on unconstitutional legislation coming from the House would not have been as effective had the two bodies been similarly constructed. The smaller size of the Senate is intended to make senatorial proceedings less cumbersome and more deliberative. This would also give senators the opportunity to measure unwise or unconstitutional legislation against popular sentiment and still have time for vindication prior to the next election.

The staggering of terms in the Senate is a structural oddity intended to preserve continuity in the Senate. Continuity provides the Senate the necessary stability to carry out the special functions and duties expected of this body by those who wrote the Constitution.

The Senate is sometimes criticized for permitting lengthy debate, or obstruction, especially when it occurs because of the actions of a single senator or a small group of senators. There are specific rules governing debate in the Senate.

The Senate first adopted rules in 1789, and they continue in force today. The House organizes itself every two years. With the election of each new Congress, the rules of the House of Representatives are written, adopted and are effective anew, starting from scratch in effect, but of course with due consideration of what's been done before. The Senate never reorganizes in this way. It was organized in 1789. It adopted its rules of procedures, depending a great deal on the manual of Thomas Jefferson, who was the vice president, and who outlined the rules of procedure which still exist today. Some are not always followed, but nonetheless, these are the only rules the Senate has, those that were written in 1789. The rules have been amended from time to time, but only on a vote of two-thirds of

the members of the United States Senate. So no simple majority can change the rules of the Senate. And no simple majority at the end of an election or two-year cycle can reorganize the Senate under new rules. It can't be done.

When the Senate first adopted rules in 1789, Rule 4 stipulated no senator shall speak more than twice in any one debate on the same day without leave of the Senate. This is still the rule today. Sometimes senators, when they begin to speak the second time on a measure during a single day are not restrained by an objection, but if an objection is made, they are ruled to be out of order and asked to take their seat.

Another rule—this one from Thomas Jefferson's Manual of Parliamentary Practice, prepared when he was president of the Senate from 1797 to 1801—included the English rule that "No one can speak impertinently or beside the question superfluous or tediously." Unfortunately, that is not the rule today, at least in practice. I've heard some speeches I thought were tedious beyond belief. But they were the exception, of course.

The modern rule governing the length of debate is found in Senate Rule 22, first adopted as an amendment in 1917. At that time, two-thirds of the Senate present and voting was needed to invoke cloture or bring debate to an end. Until then, there was no need for invoking cloture. There was no such thing as bringing debate to an end. But in 1917, the Senate adopted this rule. Over the years, the fraction required for cloture has changed. In 1975, the rule was amended to lower the number needed for cloture to three fifths of the Senate membership . . . sixty.

The right to speak at length protects the rights of small states and minorities, whether their interests are geographical or philosophical. It also vests each senator with a resource that can be used to influence the legislative process to ensure fair treatment of his state or due consideration of any proposition he thinks should be considered at that moment. For unless cloture is invoked by a vote of sixty senators, any amendment is in order, and even if cloture is invoked, any germane amendment is in order. So, not only can a senator talk without limitation, he can change the subject and force the Senate to con-

sider his amendment. These rights of individual senators and the states they represent are tied together, and if one is abridged, so is the other.

Now, to the treaty-making process. Given the attention attached to the President's role in the formulation of foreign polity, it is ironic that until quite late in the Philadelphia Convention, the draft Constitution gave the Senate exclusive power to make treaties and appoint ambassadors. Only in the last month of the Constitutional Convention did the delegates agree to divide the power between the President and the Senate.

Some of the reasons given by the Framers for including the Senate in the treaty-making process may seem antiquated today. In Federalist Number 64, John Jay, later Chief Justice, argued that because of the need for perfect secrecy and immediate despatch in the making of some treaties, it was natural to vest that process in the President and the Senate with its small membership. He was contrasting what it would have been like if it had been vested in both the Senate and the House because of the necessity for secrecy and despatch. Alexander Hamilton in Federalist Number 75 offered similar arguments for excluding the House of Representatives from the treaty-making process.

While a number of contemporary studies assign the responsibility to negotiate treaties solely to the President, that position is not supported by the constitutional text or by practice. The President: "shall have power by and with the advice and consent of the Senate to make treaties." Nothing in this language suggests exclusive power for the President to negotiate a treaty without the involvement of the Senate. A strict reading of the constitutional language leads to the conclusion that treaty-making is to be done jointly by the President and the Senate.

That is how the process worked in the early decades, and that is how the process works today. President George Washington sought the Senate's role in the initial process of drafting a treaty and deciding on its general characteristics. He spoke of sending "propositions" to the Senate, suggesting that the treaties would be in draft form and fully susceptible to Senate

modification. In these sentiments, there are echoes to Hamilton's views in Federalist Number 75, where Hamilton said that the power of making treaties, "will be found to partake more of the legislative than of the executive character, though, it does not seem strictly to fall within the definition of either of them."

We can cite one disappointing experience President George Washington had when traveling to the Senate to discuss an Indian treaty. On August 21, 1789, he let the Senate know of his intention to meet with senators in the Senate chamber "to advise with them on the terms of the treaty to be negotiated with the Southern Indians." Notice the language, "to be negotiated." Clearly, he intended to present the senators with a draft, not a final document to be voted up or down. When he met with the senators the next day, both sides expressed some frustration with the process. Washington did not get the immediate vote of approval he anticipated, and senators did not want to rely solely on the information supplied by the Secretary of War, who had accompanied him. And because of the noise being generated outside by carriages going by, the windows were open, participants found it hard to hear. Two days later, Washington returned and provided answers to the questions the Senate had presented and received the Senate's consent to the treaty.

President Washington continued to seek the advice of the Senate on treaty drafts, but he did so through written communication rather than personal appearances in the Senate.

Over the years, senators have been asked to approve the appointment of treaty negotiators and have offered advice on their negotiating instructions. In order to build legislative understanding and support, presidents have frequently included the Senate in the process of negotiating treaties. A more recent example was the negotiation of the United Nations Charter. Of the eight members of the U.S. delegation, half came from Congress: Senators Tom Connally, Democrat of Texas, and Arthur H. Vandenberg, Republican of Michigan, Representative Sol Bloom, Democrat of New York, and Charles A. Eaton, Republican of New Jersey. Also participating in that negotiation was

John Foster Dulles who later became Secretary of State. In hearings in 1945, Dulles admitted that previously he had "some doubts as to the wisdom of senators participating in the negotiation of treaties." Yet his experience with the U.N. Charter "dispelled" those concerns.

NATO is another example of cooperation between the Senate and the President in treaty negotiation. Senior members of the Senate Foreign Relations Committee participated actively in the drafting of this mutual security act. In hearings in 1971, well after the negotiations had been completed, Dean Acheson, drawing on his many years of experience in foreign affairs and as Secretary of State, strongly endorsed participation by the Senate in the treaty negotiation process. While it was theoretically possible to distinguish between negotiation by the President and the consent of the Senate he said, and I quote: "Anybody with any sense would consult with certainly some of the members of the ratifying body before he got himself out on the very end of a limb from which he could be sawed off."

During negotiations of the North Atlantic Treaty, Acheson said that "Senators Thomas Connally and Arthur Vandenberg were with me all the time, and one of the provisions of NATO was written by Senator Walter George."

That model was also followed during the discussions and negotiations of the Strategic Arms Limitations Treaty between Russia, the USSR at the time, and the U.S., and the START talks during the Bush Administration. The current expansion of NATO has been negotiated with Senate observers from key committees. The same is true of the proposed global climate change agreement, which will be the subject of a meeting next week or the end of this week in Bonn, and then in a final meeting to conclude the agreement in Kyoto in December. The Senate, as a matter of fact, passed a resolution recently suggesting, spelling out, provisions that the President should ensure be included in the Kyoto Agreement on climate change.

Woodrow Wilson, you may remember, entertained a different, and unfortunate, attitude toward the treaty process. As a young scholar, he had counseled that presidents should not consult with the Senate on treaty negotiations. Instead, the

President should act single-handedly and then drop the completed treaty in the Senate's lap, daring it to reject what had received so much fanfare. Under these pressures, the Senate would hesitate "to bring about the appearance of dishonor which would follow its refusal to ratify the rash promises or to support the indiscrete threats of the Department of State." Wilson advanced the same philosophy in a book that appeared some years later.

This strategy, of course, backfired with the Treaty of Versailles. Having excluded the Senate from the negotiating sessions and failing to build a legislative consensus, the President was repudiated. The Senate rejected the treaty in November of 1919 and again in 1920. His decision to crisscross the country to lobby strenuously for the treaty, attempting to go over the United States, was not only unsuccessful but probably contributed to his physical and emotional collapse.

Later presidents have been more pragmatic and have treated the Senate as a partner in the treaty-making process.

The President is responsible for interpreting and implementing a treaty. The interpretation, however, can sometimes turn into reinterpretation. If reinterpretation is at odds with the Senate's understanding of the meaning of a treaty, the President can be embarrassed by the refusal of the Senate to join him in the implementation of policies or legislation based on such reinterpretation. The recent Helsinki Accords are a case in point. The issue of missile defense is being defined under new understandings of anti-ballistic missile treaty provisions agreed upon between Presidents Clinton and Yeltsin at the Helsinki Meeting last March 21. Many of us in the Senate disagree with the President's position on this issue.

Beginning in 1974, Congress extended to the President special or fast track authority to negotiate trade agreements with other nations. In trade agreements, the House is included because of its power to raise revenue through the imposition of tariffs and to legislate trade preferences.

Under fast track authority, once the President submits to Congress a bill to implement a trade agreement, committees must act within a specified number of days, and Congress must

complete floor action within a certain period of time. Amendments to the bill are prohibited, either in committee or on the floor of the House or the Senate under this authority. Only a majority vote in both houses of Congress is required to approve the implementing legislation as compared with two-thirds vote in the Senate for a treaty. The fast track procedure was used to adopt amendments to GATT, the General Agreement on Tariffs and Trade, and the North Atlantic Free Trade Agreement, NAFTA. President Clinton has now asked Congress to approve the extension of that fast track authority to permit a new round of negotiations within this hemisphere to bring other countries into parity with Mexico and Canada in trade relations with the United States.

Congress first adopted the Fast Track Procedure in 1974 because it recognized that trade agreement negotiators "cannot be expected to accomplish negotiating goals if there is no reasonable assurance that can be given to the negotiating partners that agreements would be voted up or down on their merits." But rather, if the likelihood was that these negotiated agreements were going to be modified in many respects, or even in some, by the Congress of a negotiating party, then there would be less interest in working very hard to reach an agreement. Other nations wouldn't be willing to negotiate if there was a possibility that Congress could simply ignore the implementing bill or amend it, willy-nilly, thereby, requiring a new round of negotiations, starting all over again on some subject.

So fast track authority is especially helpful, in view of the practices of the past, in negotiation of treaties involving multiple parties. In return for authorizing the fast track procedure, Congress regarded it as essential that the Congress and the various segments of our economy which are likely to be affected by trade negotiation be fully involved in the negotiating process. So, representatives of these associations or trade groups are customarily invited as observers to the negotiations along with members of Congress.

In 1991, during hearings on the negotiations leading up to NAFTA, and GATT, the U.S. trade representative, Carla Hills, described the process as "a genuine partnership between the

two branches," and that Congress must have "a full role throughout the entire process in formulating the negotiating objectives in close consultation as the negotiations proceed." President Bush gave Congress his "personal commitment to close bipartisan cooperation in the negotiations and beyond." President Clinton is having a hard time, however, at the present convincing his own party members in Congress to support his current efforts to obtain fast track authority.

Finally, the power to disapprove the President's nomination of officers, judges, and ambassadors gives the Senate another source of power to shape domestic as well as foreign policy. It is another example of the unique and special role played by the Senate.

Appointment is divided into two steps; the first step by the President, the next by the Senate. The Constitution provides that the President, and I quote: "Shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other offices of the United States." A strict reading of this provision suggests that only after the President nominates does the Senate offer its advice and consent. But, it works that way only some of the time, not all the time.

The process of selecting judges has developed over time to the point where senators of the President's own party actually select U.S. District Court judges in their own states, with the concurrence of the President and the full Senate. And, a senator has what amounts to a veto power over the selection of judges, U.S. attorneys, and U.S. Marshals in his own state even if he is a member of the opposition party. Court of Appeals and Supreme Court nominees are, in fact, selected by the President, but the suggestions of senators are considered and often followed in Court of Appeals selections; and they are sometimes followed in selecting Supreme Court nominees.

The constitutional power conferred upon the Senate to confirm judicial appointments is quite broad. Constitutional text and history indicate that the Framers intended for the Senate to perform some substantive interpretation and analysis

in appointments. Professor Lawrence Tribe, the constitutional law scholar at Harvard University Law School, points out, and I quote: "The senatorial role of advice and consent is not to be read out of the Constitution. An advisor is entitled to take into account all the same considerations as the advisee." Indeed, the early drafts in the Philadelphia Convention placed the entire appointment power in the Senate.

This gives senators great influence in the make-up of the judiciary. It can affect the philosophy of a court; it can serve as a restraint against overzealous efforts, such as President Roosevelt's so-called court-packing scheme in the 1930s. The refusal of the Senate to confirm Robert Bork is another example of the practical effect of the Senate's influence.

The confirmation power can be exercised to influence foreign policy when those nominated to serve as ambassadors come before the Senate for approval. This was on all the front pages recently when Senator Jesse Helms, Chairman of the Senate Foreign Relations Committee, refused to report to the Senate the nomination by President Clinton of Governor William Weld to be Ambassador to Mexico.

When the Senate considers nominations for the President's cabinet and other high-level positions of executive responsibility, it necessarily influences national policy on the subjects under the authority of the officer who is to be confirmed. Other examples are the refusal of the Senate to confirm John Tower of Texas to be President Bush's Secretary of Defense and Jocelyn Elders to be President Clinton's Surgeon General.

The Senate's confirmation process also forces public scrutiny of a nominee's views and qualifications, and it means that only after the opportunity for careful review can anyone be vested with the powers of high office in our national government.

The United States Senate was created to play a special role in making laws and in deciding who should execute those laws. Senators have the constitutional responsibility to represent their state's interests in fulfilling that special role. It is a unique mixture of legislative, judicial, and executive power that makes it a role like no other in our republic. Thank you.

THE GREAT DISSENTERS: PARALLEL CURRENTS IN HOLMES AND SCALIA

Thomas F. Shea[*]

I. INTRODUCTION

Under a republican form of government, the people consent to be governed by laws enacted by their representatives chosen by a majority vote.[1] Those in the minority who disagree with the laws may combine into new majorities to elect representatives who will repeal the offending laws, or they can vote with their feet and move to a state or country where the offending laws are not in force. But if they take neither course of action, they must obey the laws enacted by the majority.

However, in the United States, a third countermeasure is available. The Constitution of the United States is superior to any law enacted by Congress or the state legislatures. At least since the early nineteenth century, American jurisprudence has been settled that any law repugnant to the Constitution is void.[2] When deciding cases or controversies, it is particularly the task of the United States Supreme Court to determine the requirements of the Constitution and whether a federal or state law is contradictory to the mandates of the Constitution.

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[1] THE FEDERALIST NO. 10, at 47 (James Madison) (Buccaneer Books ed., 1992). Contrasted to a pure democratic form of government, a republic will yield a voice "more consonant" with public welfare. *Id.*

[2] Marbury v. Madison, 5 U.S. (6 Cranch) 137, 180 (1803); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810). The Constitution's supremacy to all other laws is a common characteristic shared by the majority of written constitutions. *Marbury*, 5 U.S. at 180.

Chief Justice John Marshall commented simply, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[3] Notably, however, the Chief Justice did not say that the Court maintains the prerogative to say what the law *should* be. If nothing appears in the Constitution which forbids the requirements of state or federal law, that law is to be given effect. Those who believe that the Constitution should forbid passage of a particular law are invited by the Constitution to the amendment process,[4] whereupon passage of the obnoxious statute would become null and void.

It follows that the Supreme Court can sin against the Constitution in two ways: (1) by discovering constitutional provisions not placed there by the framers or by the process of amendment, or (2) by failing to give effect to the provisions that are expressly incorporated by the document. A court following either illegitimate course would be unfaithful to the governmental structure provided for the United States by the Constitution. In the first instance, the court would be acting as an unelected legislature and not as a court; in the second, it would violate the oath its members had taken to support the Constitution. Though separated on the bench by over five decades, two Justices of the United States Supreme Court have been particularly faithful to these principles — Oliver Wendell Holmes and Antonin Scalia.

Justice Holmes, "the great dissenter,"[5] earned his sobriquet not by the volume of his dissenting opinions, but by the fact that many of them, over the course of time, were adopted as controlling authority by new majorities of Supreme Court Justices. Only time will tell whether the same outcome awaits the dissents of Justice Scalia, but a trend in that direction may now be discerned.

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[3] *Id.* at 177.

[4] U.S. CONST. art. V.

[5] SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 103 (1956); COLUMBIA ENCYCLOPEDIA 1257 (5th ed. 1993). Justice Holmes often wrote his dissenting opinion immediately following the Court's vote and then tailored his analysis in response to the majority opinion. *See* KONEFSKY, *supra* pp. 103-04.

II. The Four-Corners Approach to Interpretation

A. Substantive Due Process—Economic Rights

Chief Justice John Marshall considered, but ultimately rejected, the propriety of striking down legislation which is not forbidden by any language of the Constitution. In *Fletcher v. Peck*,[6] a state statute annulled the land title of a good faith purchaser acquired under a legislative grant.[7] Declaring the annulment a violation of the Constitution's Contract Clause,[8] Chief Justice Marshall added in dictum that the state statute was also violative of "general principles which are common to our free institutions."[9] Later, however, when appeal to some unexpressed content would have been the only way to strike down state action as unconstitutional, Marshall refused to follow that path. Illustratively, in *Barron v. Mayor & City Council of Baltimore*,[10] the City of Baltimore destroyed the utility of a privately owned wharf during road work and had refused to pay any compensation to the owner.[11] Marshall noted that because the Bill of Rights was intended only as a restriction on the federal government and not on the states, the Fifth Amendment's prohibition against taking property without just compensation did not aid the wharf's owner.[12] However, without any attempt to brand this municipal piracy a violation of the spirit, though not the letter, of the Constitution, Justice Marshall concluded, "We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland . . . and the constitution of the

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[6] *Fletcher*, 10 U.S. at 87.

[7] *Id.* at 88.

[8] U.S. CONST. art. I, § 10, cl. 1.

[9] *Fletcher*, 10 U.S. at 139. The Court held that the Constitution conferred jurisdiction upon federal courts in suits brought against a state and, therefore, found a suit claiming a state's violation of its own contract to be properly before a federal court. *Id.*

[10] 32 U.S. (7 Pet.) 243 (1833).

[11] *Barron*, 32 U.S. at 243-44. The plaintiffs asserted the Fifth Amendment's "taking" clause also prohibited a *state's* "unjust taking of private property." *Id.* at 246 (emphasis added).

[12] *Id.* at 250-51.

United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed."[13]

Thirty-five years later, however, an event transpired which ultimately altered the Doric principles of constitutional interpretation. That event was the 1868 ratification of the Fourteenth Amendment. Enacted after the Civil War to protect the rights of the newly-freed slaves from state interference,[14] the amendment provided that

> no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[15]

The obvious meaning of the term "due process" in the Fourteenth Amendment, which had been binding on the federal government by its inclusion in the Fifth Amendment since 1791, is that *procedural* safeguards must be provided before a state may execute or imprison a person or confiscate his property. Essentially, due process requires that notice and a hearing be afforded an individual when the power of government is applied against that individual.[16] According to Justice Frankfurter, "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[17]

Nevertheless, in 1873 the butchers of New Orleans con-

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[13] *Id.* at 251.

[14] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.2 at 369-70 (5th ed. 1995). Concurrent with Congress' proscription of state infringement, the judiciary also limited state authority by relying on specific constitutional language instead of natural law in *ex post facto* cases and bill of attainder cases. *Id.* at 370.

[15] U.S. CONST. amend. XIV, § 1.

[16] McVeigh v. United States, 78 U.S. (11 Wall.) 259, 267 (1870).

[17] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). The procedural safeguards provided by due process also serve the important societal and political function of giving the "appearance" of fairness. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 483 (1986).

tended for an additional and different meaning of the Fourteenth Amendment's Due Process Clause.[18] Foreclosed, with one exception, by Louisiana law from operating their own slaughterhouses within the city, three butchers claimed that they had a right to operate such establishments.[19] Protected by the due process clause because they raised no procedural objection to the law, the plaintiffs claimed that substantive rights were also created under the rubric "due process."[20] A five-member majority of the Supreme Court rejected this novel proposition, saying

> under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.[21]

Appealing to one of the four dissenting Justices, the argument prompted Justice Bradley to note "[i]n my view, a law which prohibits a large class of citizens from adopting a lawful employment . . . does deprive them of liberty as well as property, without due process of law."[22]

The majority's approach in the *Slaughterhouse Cases* was consistent with the concept that "rights" unmentioned in the Constitution should not be employed to strike down state or federal legislation. As an earlier Justice wrote in rejecting the reading of natural law proscriptions into the Constitution,

> [t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of

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[18] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 66 (1872).

[19] *Slaughter-House*, 83 U.S. at 57-58.

[20] *Id.* at 52-55.

[21] *Id.* at 81. Interestingly, the Court in 1872 predicted that the Fourteenth Amendment's protection would be applied only by black persons. *Id.*

[22] *Id.* at 122 (Bradley, J., dissenting).

natural justice.[23]

Later, however, the Court held that when a state takes private property for public use, that state it must pay compensation to the owner.[24] Chief Justice Marshall's opinion to the contrary, it must be recalled, was written prior to the ratification of the Fourteenth Amendment which, for the first time, applied the due process clause to the states.[25] The Court seemed to consider just compensation, along with notice and an opportunity to be heard, as part of the bundle of procedural rights now required of the states by the Fourteenth Amendment.[26] Eight years after *Chicago, B. & Q. Railroad Co.*, a 5-4 majority of the Court was ready to greet substantive due process with open arms. Joseph Lochner, the owner of a Utica bakery, objected to a New York law setting maximum weekly hours for his baker-employees.[27] Raising no objection to the law's enforcement *procedures*, he asserted that the Fourteenth Amendment protected his "liberty," not only to be free from confinement, but to enforce whatever contracts of employment his workers were willing to enter into.[28] In short, Lochner claimed the word "liberty" in the Fourteenth Amendment created a substantive constitutional right to make business decisions unfettered by state-imposed restrictions.[29]

The Court agreed, stating, "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[30] The Court added, "There is, in our judgment, no reasonable foundation for holding [the New York statute] to be necessary or appropriate as a health law to safe-

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[23] Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J).

[24] Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

[25] *Barron*, 32 U.S. (7 Pet.) at 250-54.

[26] *Chicago, B & Q R. Co.*, 166 U.S. at 238-39.

[27] Lochner v. New York, 198 U.S. 45, 48 (1905), *overruled in part by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), *and*, Ferguson v. Skrupa, 372 U.S. 726 (1963).

[28] *Lochner*, 198 U.S. at 48.

[29] *Id.*

[30] *Id.* at 53.

guard the public health or the health of the individuals who are following the trade of a baker."[31]

Under the banner of preventing a deprivation of "liberty without due process," it was obvious the Court was substituting its judgment regarding the wisdom of the law for the judgment of the state legislature. However, nothing in the language of the Constitution authorized the Court to do so. The Court specifically stated: "We do not believe in the soundness of the views which uphold this law."[32] The Court did not seek to justify its ruling on the ground that the statute violated the Contract Clause[33] of the Constitution because that clause only protects existing contracts, and the state's prohibition was applicable to contracts or arrangements to be made in the future.[34]

According to professor Warren, the injection of a purely substantive component into the phrase "due process" was without historical foundation.[35]

> The phrase, "liberty or property without due process of law" came to us from the English common law; and there seems to be little question that, under the common law, the word "liberty" meant simply "liberty of the person," or, in other words, "the right to have one's person free from physical restraint."[36]

In point of fact, the majority's action in *Lochner* was presaged in dictum eight years earlier when Justice Peckham, the author of the opinion of the Court in *Lochner*, wrote:

> The liberty mentioned in that amendment means not only the

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[31] *Id.* at 58.

[32] *Id.* at 61.

[33] U.S. CONST. art. I, § 10, cl. 1. "No State shall . . . pass any Law impairing the Obligation of Contracts. . . ." *Id.*

[34] Pinney v. Nelson, 183 U.S. 144, 147 (1901).

[35] Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926).

[36] Warren, *supra* note 35, at 440. The Court held that the Clause would not prohibit a state from imposing its law on a corporation incorporated in another state with different laws.

> right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[37]

It was obvious to Justice Oliver Wendell Holmes that this doctrine was a self-created weapon for the Court to use in order to declare unconstitutional any state or federal law with which it disagreed. Dissenting in *Lochner*, he wrote:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.[38]

It was clear to Holmes that as long as a law is supported by a rational basis and not contrary to a strong tradition, any substantive due process requirement has been fulfilled. Certainly the law restricting bakers' hours passed that test. "A reasonable man might think it a proper measure on the score of health."[39] He pointed to existing laws such as usury laws and those forbidding lotteries which restricted the freedom to contract. To him, the wisdom of a law is for the legislature to determine, and courts in a democracy have no constitutional warrant to interfere with legislative enactments absent a clear collision of the enactment with the Constitution itself. Holmes continued:

> This case is decided upon an economic theory [laissez faire] which a large part of the country does not entertain. If it

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[37] Allgeyer v. Louisiana, 165 U.S. 578, 589 (1987).
[38] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).
[39] *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

> were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.[40]

Justice Holmes repeated this admonition when the Court aligned the due process clause of the Fifth Amendment to strike down a Congressional regulation of women's wages in the District of Columbia:[41]

> Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.[42]

In his dissent in *Baldwin v. Missouri*, wherein a state transfer tax was struck down, Justice Holmes reiterated his position:

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions.[43]

Notably, Justice Holmes did not distinguish between economic and moral liberty, but asserted neither is contained substantively in the concept of due process.

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[40] *Id.* at 75 (Holmes, J., dissenting).

[41] Adkins v. Children's Hospital, 261 U.S. 525, 562 (1923), *overruled in part by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[42] *Adkins*, 261 U.S. at 568 (Holmes, J., dissenting).

[43] Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

Fortunately, Holmes, who died at 93, lived long enough to see his interpretation of substantive due process in economic matters vindicated, although he was retired from the Court when the decision that adopted his position was handed down twenty-nine years after *Lochner*. Again, the legislature of the State of New York enacted the statute involved, a regulation setting the minimum retail price of milk.[44] Justice Roberts' opinion for the Court sustaining the law could have been written by Holmes himself. "[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[45] At long last a majority of the Court had recognized the force of Justice Holmes' reasoning. The use of a magic phrase to set aside laws that individual Justices would not themselves have chosen to enact turns the Court into a super-legislature and invades the respective provinces of Congress and state legislatures. When a legislative body enacts laws which are not arbitrary or discriminatory, said Justice Roberts, "it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."[46]

B. Substantive Due Process—Personal Liberties

Justice Oliver Wendell Holmes' victory in the area of economic substantive due process, however, was not duplicated when the Court applied the Fourteenth Amendment to invalidate statutes restricting personal "liberties." When the State of Nebraska forbade the teaching of foreign languages to elementary school children, the Court found that a teacher's "right . . . to teach [a foreign language] and the right of parents to engage him so to instruct their children, we think, are within the liber-

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[44] Nebbia v. New York, 291 U.S. 502, 515 (1934).
[45] *Nebbia*, 291 U.S. at 525.
[46] *Id.* at 537.

ty of the amendment."[47] The Court added in passing that the term "liberty" also included the right to acquire useful knowledge, to marry, to establish a home, to bring up children and to worship God according to the dictates of one's own conscience.[48] Holmes also dissented in the companion case of *Bartels v. Iowa*,[49] stating, "I am not prepared to say that it is unreasonable to provide that in his early years [a child] shall hear and speak only English at school. But if it is reasonable, it is not an undue restriction of the liberty either of teacher or scholar."[50] Accordingly, he concluded, "I am unable to say that the Constitution of the United States prevents the experiment being tried."[51]

However, in another situation, Justice Holmes was willing to concede the existence of a substantive personal due process liberty—where that personal liberty was explicitly in the Constitution but was originally intended only to protect from federal interference. In *Gitlow v. New York*,[52] the Court held, "[W]e may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[53] Though dissenting from the ruling that Gitlow could be punished for his speech under the circumstances in which it occurred, Holmes

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[47] Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[48] *Meyer*, 262 U.S. at 399.

[49] 262 U.S. 404, 409 (1923) (Holmes, J., dissenting). In *Bartels*, the Supreme Court struck down an Ohio law mandating that educators use only the English language while teaching students below the eighth grade. *Bartels*, 262 U.S. at 409. In striking down the law, the Court reversed the conviction of a teacher who had taught students below the eighth grade to read German. *Id.*

[50] *Bartels*, 262 U.S. at 412 (Holmes, J., dissenting).

[51] *Id.* (Holmes, J., dissenting). In *Bartels*, the Supreme Court struck down an Ohio law mandating that educators use only the English language while teaching students below the eighth grade. *Id.* In striking down the law, the Court reversed the conviction of a teacher who had taught students below the eighth grade to read German. *Id.* at 409 (Holmes, J., dissenting).

[52] 268 U.S. 652 (1925).

[53] *Gitlow*, 268 U.S. at 666. The Supreme court upheld Gitlow's conviction for criminal anarchy. *Id.* at 654.

agreed that "[t]he general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used . . . ."[54]

Holmes appeared to accept the proposition that employing the personal protections included in the Bill of Rights to restrict the states through the Due Process Clause of the Fourteenth Amendment is defensible because at least they are written into the Constitution and not simply created out of whole cloth by judicial ukase. In fact, most of the provisions of the first eight amendments have subsequently been held applicable to the states by the methodology of "selective incorporation."[55] But Justice Holmes' belief in the impropriety of including *non-textual* personal liberties in substantive due process never commended itself to a majority of his brethren as it had done where economic interests were involved. This is despite the fact that Holmes' underlying premise was identical in each instance—the Court is not authorized to add to the Constitution according to its own predilections where the document itself is silent.

Thirty years after Holmes' death the court discovered a marvelous, new unwritten liberty in the Constitution termed "the right of privacy."[56] In *Griswold v. Connecticut,*[57] the Court struck down a state law forbidding anyone, including married persons, to use contraceptives, saying,

> The present case, then, concerns a [marital] relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.[58]

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[54] *Id.* at 672 (Holmes, J., dissenting).

[55] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.2 at 340 (5th ed. 1995).

[56] Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

[57] 381 U.S. 479 (1965).

[58] *Griswold*, 381 U.S. at 485.

The Court purported to discover this right of marital privacy in what it termed the "penumbras" of the First, Third, Fourth and Ninth Amendments.[59] Said Justice Stewart in dissent, "I think this is an uncommonly silly law. . . . But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do."[60]

The right of marital privacy, as defined in *Griswold,* was soon found too narrow to suit the Court's purposes when it was sought to be applied to nullify a Massachusetts law prohibiting the *distribution* of contraceptives to *unmarried* persons.[61] Accordingly, the elastic right of privacy was quickly reformulated. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[62]

The following year saw one of the most controversial decisions in the Court's history. In *Roe v. Wade*,[63] a Texas statute forbidding abortion except to save the life of the mother was declared unconstitutional.[64] Writing for the Court, Justice Blackmun piously cited Justice Holmes for the principle that his task was "to resolve the issue by constitutional measurement, free of emotion and of predilection."[65] He then announced:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[66]

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[59] *Id.* at 484.
[60] *Id.* at 527 (Stewart, J., dissenting).
[61] Eisenstadt v. Baird, 405 U.S. 438, 440-41 (1972).
[62] *Eisenstadt*, 405 U.S. at 453.
[63] 410 U.S. 113 (1973).
[64] *Wade*, 410 U.S. at 164.
[65] *Id.* at 116.
[66] *Id.* at 153.

Justice Rehnquist pointed out that the Court's holding was more closely attuned to the majority opinion in *Lochner* than to Justice Holmes' dissent in that case.[67] Denying that the asserted right to abortion was so rooted in the traditions and conscience of the American people as to be ranked as fundamental, he noted that at the time of ratification of the Fourteenth Amendment many states and territories limited abortion and that twenty-one states still had these laws on the books at the time of the decision in *Roe v. Wade*.[68]

Justice Antonin Scalia took his seat in the Court in 1986.[69] In 1992, he wrote a dissent in *Planned Parenthood v. Casey*,[70] joined by three other Justices, which called for the total overruling of *Roe v. Wade*. Scalia's thesis was simple and identical to that of Oliver Wendell Holmes: If a purported right is not mentioned in the Constitution and not protected by a long-standing tradition of American society, it is not protected by the Constitution.[71] Accordingly, "[t]he States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so."[72]

Justice Scalia recognized that the power to terminate a pregnancy is a liberty in the absolute sense, but not a liberty protected by the Constitution.[73] Although prior to *Roe v. Wade*, and since, there has been a deeply rooted American tradition to the effect that a woman may carry her child to term free from state efforts to kill it, there was no tradition permitting *her* to kill it.[74] The majority in *Roe* sought to establish, *against* a strong contrary tradition, a value found nowhere in the constitutional text.[75]

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[67] *Id.* at 174 (Rehnquist, J., dissenting).
[68] *Id.* at 174-76. (Rehnquist, J., dissenting).
[69] 478 U.S. iv, (1986).
[70] 505 U.S. 833 (1992).
[71] *Casey*, 505 U.S. at 980 (Scalia, J., dissenting).
[72] *Id.* at 979 (Scalia, J., dissenting).
[73] *Id.* at 980 (Scalia, J., dissenting).
[74] *Id.* at 980 n.1 (Scalia, J., dissenting).
[75] *Id.* (Scalia, J., dissenting).

The majority in *Casey* suggested that even if *Roe* had been incorrectly decided, the principle of stare decisis should prevent its being overruled now, because it might appear that the Court was yielding to persistent public pressure and would suffer a loss of respect.[76] To this Justice Scalia responded, "The Imperial Judiciary lives,"[77] and quoted Abraham Lincoln's words: "'[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers. . . .'"[78]

With respect to the continuing demonstrations mounted in front of the Supreme Court building by proponents and opponents of *Roe*, Justice Scalia added, "If, indeed, the 'liberties' protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of ours."[79] In short, "[T]he American people are not fools."[80]

The liberty to terminate a pregnancy remains a part of the Fourteenth Amendment to this day, however, Justice Scalia's ratio decidendi was accepted by a majority of the Court in the recent "physician-assisted suicide" case. In *Washington v. Glucksberg*[81] the Court was asked to find "the existence of a [nontextual] liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide."[82] Writing for the Court, Chief Justice Rehnquist began by examining the nation's history, legal traditions and practices and found that the most reliable indication of a consensus is the pattern of enacted laws.[83] He observed a clear

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[76] *Casey*, 505 U.S. at 867 (Scalia, J., dissenting).
[77] *Id.* at 996 (Scalia, J., dissenting).
[78] *Id.* at 997 (Scalia, J., dissenting).
[79] *Id.* at 1001 (Scalia, J., dissenting).
[80] *Id.* at 1000 (Scalia, J., dissenting).
[81] 117 S. Ct. 2258 (1997).
[82] *Washington*, 117 S. Ct. at 2261, 2262.
[83] *Id.* at 2263.

tradition *prohibiting* physician-assisted suicide, not favoring it.[84] Nor could the claimed liberty interest be supported by general statements in prior cases concerning personal autonomy.[85] A purported "fundamental liberty interest" must be carefully described lest the due process clause "be subtly transformed into the policy preferences of the members of this Court."[86] The question presented to the Court was not whether the Constitution protects a general concept of autonomy but whether it protects a right to assisted suicide. Holding that it does not, the Court left it to the elected representatives in each state to determine whether or not physician assisted suicide is a permissible course of conduct for their constituents.[87]

III. THE STRICT CONSTRUCTIONALIST APPROACH TO INTERPRETATION

A corollary to Justice Holmes' belief that the Court ought not create new constitutional provisions was his equally firm commitment to unstinting enforcement of the provisions it actually contains.

A. The Commerce Clause

Article I of the Constitution granted Congress the power to "regulate Commerce with foreign Nations, and among the several states. . . . "[88] Seeking to remedy the evil of child labor, Congress enacted a federal law prohibiting the interstate shipment of goods made by companies employing children. A prior decision of the Court had upheld a similar prohibition on the shipment of lottery tickets across state lines.[89] Despite the apparent constitutionality of these prohibitions, the father of two young sons employed in a cotton mill, argued that Congress had no authority to prohibit the interstate shipment of

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[84] *Id.*
[85] *Id.* at 2271.
[86] *Id.* at 2268.
[87] *Washington*, 116 S. Ct. at 2275.
[88] U.S. CONST. art. I, § 8, cl. 3.
[89] Champion v. Ames, 188 U.S. 321, 363-64 (1903).

goods just because the goods were made by children.[90] Astonishingly, the Court agreed with him, distinguishing its ruling in the lottery case on the ground that lottery tickets were evil in themselves but there was nothing evil about the goods produced by child labor.[91]

In his dissenting opinion, Justice Holmes stated that, "[i]t does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil."[92] Because the Constitution clearly granted Congress power over interstate commerce, Congress alone had the right to decide which items should move interstate and which should be prevented from doing so. The states may have the right to permit child labor, "[b]ut when they seek to send their products across the state line they are no longer within their rights."[93]

Holmes' dissent became the law twenty-two years later when the Court overruled *Hammer v. Dagenhart* on the basis of what it termed "the powerful and now classic dissent of Mr. Justice Holmes. . . . "[94] The *Darby* Court reasoned that "[t]he power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce. . . . "[95] As a result, not only could child-made goods be kept from crossing state lines, so too could goods made by adults who were employed below the minimum wages or above the maximum hours set by Congress.[96]

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[90] Hammer v. Dagenhart, 247 U.S. 251, 268 (1918), *overruled in part by* United States v. Darby, 312 U.S. 100 (1941).

[91] *Hammer*, 247 U.S. at 271.

[92] *Id.* at 279-80 (Holmes, J., dissenting).

[93] *Id.* at 281 (Holmes, J., dissenting).

[94] United States v. Darby, 312 U.S. 100, 115 (1941), *declined to extend by* United states v. Lopez, 514 U.S. 549 (1995)..

[95] *Darby*, 312 U.S. at 116.

[96] *Id.* at 125-26. The *Darby* Court upheld section 15 of the Fair Labor Standards Act which prohibited the interstate shipment of goods made by employees working at other than the prescribed minimum rates or maximum hours. *Id.*

B. Separation of Powers

Justice Scalia also believes that a grant of power in the Constitution should be honored by the Court. More specifically, when a power is constitutionally entrusted to a particular branch of the government, Justice Scalia believes that the principle of separation of powers requires that it remain there, at least with respect to its essential core. In *Morrison v. Olson*,[97] the Court focused on Congress' creation of an "independent counsel" to investigate and prosecute officials within the Executive Branch.[98] Instead of facing a prosecutor from the Justice Department who would be appointed by the Attorney General and under the ultimate control of the President, potential defendants would face a prosecutor appointed by a special court who could essentially be removed only for cause.[99] Seven members of the Supreme Court upheld this arrangement even though the independent counsel was performing a *purely* executive function, the prosecution of criminal defendants, without being subjected to presidential appointment or removal at the pleasure of the Chief Executive.[100]

Only Justice Scalia dissented. Referring to the design of the Constitution and to the Federalist Papers, he wrote, "Without a secure structure of separated powers, our Bill of Rights would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours."[101] Justice Scalia observed that the Act required the Attorney General to apply for an appointment of independent counsel after receiving a Congressional request to do so unless there were "'no reasonable grounds to believe that

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[97] 487 U.S. 654 (1988).

[98] *Morrison*, 487 U.S. at 660. 28 U.S.C. §§ 591-599 allowed for the appointment of an "independent counsel" to investigate and prosecute members of the executive branch for violation of certain federal criminal laws. *Id.*

[99] *Id.* at 661. 28 U.S.C. § 596(a)(1) provided that excluding impeachment and conviction, the "independent counsel" could only be removed from office for good cause, physical disability, mental incapacity, or for any condition which substantially impaired the performance of his duties. *Id.* at 663.

[100] *Id.* at 696-97. Justice Kennedy took no part in the decision. *Id.* at 697.

[101] *Id.* at 697 (Scalia, J., dissenting).

further investigation [was] warranted.'"[102] Noting that Article II of the Constitution states, in part,"'The executive Power shall be vested in a President of the United States'"[103] he added, "this does not mean *some* of the executive power, but *all* of the executive power."[104] Justice Scalia further explained that because criminal prosecution is incontestably the exercise of purely executive power and the President is being deprived of exclusive control over its exercise, the independent counsel legislation is unconstitutional. It represents an attempt by Congress to severely weaken the coequal Executive Branch in violation of the separation of powers principle. Said Justice Scalia, "It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are."[105]

The majority's opinion in *Morrison v. Olson* appeared to be an invitation to Congress to bypass the Executive Branch in obtaining the enforcement of federal law. Ironically, the next separation of powers case to reach the Court concerned Congress' desire to escape what had been previously thought to be its own legislative responsibility—the determination of the permissible sentencing ranges for those convicted of federal crimes. Congress created the United States Sentencing Commission as an independent commission in the Judicial Branch.[106] One purpose of establishing the Sentencing Commission was to devise guidelines for sentencing in order to achieve rough uniformity of punishment among similarly situated offenders.[107] In *Mistretta v. United States*,[108] the Court upheld this approach against the contention that Congress had violated the constitutionally mandated separation of powers by

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[102] *Morrison*, 487 U.S. at 702 (Scalia, J., dissenting).

[103] *Morrison*, 487 U.S. at 705 ((Scalia, J., dissenting) (citing U.S. CONST. art. II, § 1, cl. 1).

[104] *Id.* at 705 (Scalia, J., dissenting).

[105] *Id.* at 709 (Scalia, J., dissenting).

[106] 28 U.S.C. § 991(a) (1994).

[107] 28 U.S.C. § 991(b)(1)(B) (1994).

[108] 488 U.S. 361 (1989).

delegating its authority to the United States Sentencing Commission.[109] Once again, only Justice Scalia dissented, "because [he could] find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws."[110]

Justice Scalia recognized that the handing down of rule-making power was permissible, but distinguished those instances from *Mistretta v. United States* by pointing out that all previously upheld "delegations" involved the power to regulate in aid of carrying out executive or judicial functions.[111] Thus, courts may be permitted to adopt rules of procedure and executive agencies may issue regulations concerning the performance of executive duties such as issuing radio and television licenses or interpreting the tax laws passed by Congress.[112] However, the Sentencing Commission is not an executive agency and it is not a court. It exists *only* to legislate, and it is not the Congress. Justice Scalia sarcastically warned that because of the majority's decision, he foresaw the possibility of Congress delegating various portions of its lawmaking responsibility to "expert" bodies that were insulated from the political process.[113] "How tempting to create an expert Medical Commission composed of mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy to dispose of such thorny, "no-win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research.[114]

Justice Scalia's solitary, fervent dedication to the Framers' conviction that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty"[115] than the principle of separation of powers, made his voice appear as one crying in the wilderness.

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[109] *Mistretta*, 488 U.S. at 412.
[110] *Id.* at 413 (Scalia, J., dissenting).
[111] *Id.* at 417-18 (Scalia, J., dissenting).
[112] *Id.* at 417 (Scalia, J., dissenting).
[113] *Id.* at 422 (Scalia, J., dissenting).
[114] *Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting).
[115] THE FEDERALIST No. 47, at 244 (James Madison) (Buccaneer Books, Inc., 1992).

But the echoes of that lone voice can be heard in one of the Court's most recently decided cases, *Printz v. United States*,[116] which struck down a federal law requiring state law enforcement officers to perform background checks on prospective handgun purchasers.[117]

Justice Scalia wrote for a majority of five Justices in declaring the law violative both of state sovereignty and of the separation and equilibration of powers between the three branches of the federal government. Justice Scalia reasoned that the statute, the "Brady Act," took from the President of the United States the responsibility of executing federal law and transferred it to thousands of state law enforcement officers who are beyond Presidential control.[118] Noting that the Constitution grants only the President the power to enforce federal law, Justice Scalia stated, "That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[119]

C. Procedural Due Process

As previously noted, Justice Holmes also had no difficulty honoring the rights found within the four corners of the Constitution. It was natural for him to apply the Due Process Clause to the purpose for which it was originally intended—to provide genuine procedural safeguards for those facing governmental power. For instance, Justice Holmes felt that the Due Process Clause compelled reversal of a death sentence where the

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[116] 117 S. Ct. 2365 (1997).

[117] *Printz*, 117 S. Ct. at 2384. The act required the Attorney General to implement a national instant background check at the point of sale by November 30, 1998. *Id.* at 2368. In the interim period, the law required the "chief law enforcement officer" (CLEO) to ascertain within five business days whether the purchase violated any laws. *Id.* at 2369.

[118] *Id.* at 2378. Justice Scalia argued the power of the Federal Government would compound greatly if it could bring the police officers of the states into its service. *Id.*

[119] *Id.*

defendant's trial was disrupted by an angry mob.[120] Dissenting from the Supreme Court's refusal to issue a writ of habeas corpus, Justice Holmes wrote, "Whatever disagreement there may be as to the scope of the phrase 'due process of law' there can be no doubt that it embraces the fundamental conception of a fair trial. . . . [M]ob law does not become due process of law by securing the assent of a terrorized jury."[121] The Court has since, of course, adopted this view and today due process requires that a jury be protected from outside influences on their factual determination.[122]

Like Holmes, Justice Scalia is as willing to enforce the rights which are contained in the Constitution as he is unwilling to honor purported rights which are not. One such right clearly stated in the Sixth Amendment is that of a criminal defendant "to be confronted with the witnesses against him. . . ."[123] In *Maryland v. Craig*,[124] a child who was an alleged victim of sexual abuse was permitted to testify against the defendant from a separate room over one-way television.[125] The defendant remained in the courtroom and could see the child on a television screen, but the child witness could not see the defendant.[126] Five Justices held that this arrangement did not violate the Confrontation Clause because that provision only expresses a "preference" for face-to-face confrontation at trial which can yield to the needs of a sensitive child who might be harmed by the emotional trauma caused by the defendant's presence.[127] The Court claimed that the

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[120] Frank v. Mangum, 237 U.S. 309, 313-15 (1915) (Holmes, J., dissenting).

[121] *Frank*, 237 U.S. at 347 (Holmes, J., dissenting).

[122] *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (holding that writ of habeas corpus should be granted when defendant convicted in trial that had persuasive and prejudicial publicity during trial and disruptive influences in courtroom).

[123] U.S. CONST. amend. VI.

[124] 497 U.S. 836 (1990). The trial court found that confrontation with the witness would lead to emotional distress for the children. *Id.* at 842.

[125] *Craig*, 497 U.S. at 843.

[126] *Id.* at 841-42. The trial court allowed counsel for both sides to examine the child. *Id.* at 841.

[127] *Id.* at 849. The court emphasized the societal priority in fact finding. *Id.*

protections of the Confrontation Clause are not absolute,[128] pointing to the admissibility of hearsay statements by absent declarants.[129]

To describe Scalia's dissent, joined by three other Justices, as scathing would be an understatement. He dismissed the analogy to hearsay, noting that the two are clearly distinguishable; with hearsay, the defendant at least has the opportunity to confront the witness who heard the out of court statement, while with the closed-circuit testimony, there is no confrontation at all.[130] In Scalia's mind, declaring face-to-face confrontation with witnesses who *appear at trial* not to be an indispensable element of the confrontation clause is similar to declaring that "being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial."[131] To Justice Scalia, the Court was subordinating explicit constitutional text to currently favored public policy, even though the purpose of enshrining confrontation in the Constitution was precisely to assure that this does not occur.[132] He noted that children are particularly vulnerable to suggestion and are often unable to separate fantasy or suggestion from reality.[133] Accordingly, the right to full confrontation is particularly crucial where an innocent defendant must challenge a child's reliability as a witness. In any event, Justice Scalia stated:

> In the last analysis . . . this debate is not an appropriate one. I have no need to defend the value of confrontation, because the Court has no authority to question it . . . We are not free to conduct a cost-benefit analysis of clear and explicit con-

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[128] *Id.* at 848.

[129] *Id.* at 848-49. The court noted that certain narrow circumstances warranted the abrogation of confrontations. *Id.* at 848.

[130] *Craig*, 497 U.S. at 864-65 (Scalia, J., dissenting). Justices Brennan, Marshall, and Stevens joined the dissent. *Id.* at 860.

[131] *Id.* at 862 (Scalia, J., dissenting).

[132] *Id.* at 861 (Scalia, J., dissenting).

[133] *Id.* at 868 (Scalia, J., dissenting). Justice Scalia noted that the "special" reasons for dispelling the Confrontation Clause in the case of child testimony were matched by the reasons for insisting upon it. *Id.*

> stitutional guarantees, and then to adjust their meaning to comport with our findings.[134]

Sadly, the Court has not yet revisited this matter and *Maryland v. Craig* remains festering, unburied on the Court's escutcheon.

D. Capital Punishment

In another area involving faithfulness to constitutional text, Justice Holmes recognized that because capital punishment was mentioned in the Fifth Amendment,[135] the death penalty could not have been considered by the drafters of the Constitution to be forbidden as "cruel and unusual punishment" under the Eighth Amendment. In fact, Justice Holmes joined a dissenting opinion of Justice White which said precisely that.[136]

Although the clarity of Holmes' interpretation of the constitutionality of the death penalty was later questioned by the Court,[137] it is now firmly established that imposing the death penalty for murder does not, in itself, violate the Eighth Amendment.[138] However, the procedures necessary in connec-

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[134] *Id.* at 869-70 (Scalia, J., dissenting).

[135] U.S. CONST. amend. V. "No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life . . . without due process of law."

[136] Weems v. United States, 217 U.S. 349, 409 (1910) (White, J., dissenting).

> Death was a well-known method of punishment [at the time of ratification of the eighth amendment] prescribed by law, and it was of course painful, and in that sense was cruel. But the infliction of this punishment was clearly not prohibited by the word cruel, although that word manifestly was intended to forbid the resort to barbarous and unnecessary methods of bodily torture, in executing even the penalty of death.

Weems, 217 U.S. at 409.

[137] Furman v. Georgia, 408 U.S. 238, 239-40 (1972), *reh'g denied*, 409 U.S. 902 (1972). The court held that imposition and carrying out of death penalty constituted cruel and unusual punishment. *Furman*, 408 U.S. at 239-40.

[138] Gregg v. Georgia, 428 U.S. 153, 207 (1976), *order vacated by*, 429 U.s. 1301 (1976), *and reh'g denied*, 429 U.S. 875 (1976). The court held that imposition of the death penalty under Georgia's statutory system did not violate the United states Constitution. *Gregg*, 428 U.S. at 207.

tion with its imposition have been closely debated by the Justices. For example, the sentencing party's discretion must be channeled by requiring the consideration of aggravating and mitigating circumstances.[139] And the Court must not be forbidden from considering all mitigating circumstances.[140]

But if a defendant must be afforded every opportunity to mitigate his guilt, should not the prosecutor be given a chance to show the impact of the murderer's crime on his victim's family? In a 1987 decision, *Booth v. Maryland*,[141] the Court answered this question negatively, holding that a victim impact statement is irrelevant to the defendant's personal responsibility and moral guilt and also presents a "constitutionally unacceptable risk" that the death penalty may be capriciously imposed.[142] The Court reasoned that victim impact information might inflame the jury and divert attention from the defendant and the crime, which are the only proper factors to be considered in determining the appropriate sentence.[143]

In his dissent, Justice Scalia pointed out that a defendant's very eligibility for a death sentence depends on factors extraneous to his moral guilt.[144] A bank robber who aims, fires, and kills a guard may be executed, but the same robber whose gun misfires may not receive the death penalty, although his degree of moral guilt is the same in each instance.[145] In fact, the degree of harm the robber causes is directly related to society's

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[139] *Id.* at 206. The court noted that unguided juries imposed "freakish" death sentences. *Id.*

[140] Lockett v. Ohio, 438 U.S. 586, 604 (1978). The Court, however, noted that their decision in no way limited a court's traditional authority to exclude irrelevant evidence. *Lockett*, 438 U.S. at 604 n.12.

[141] 482 U.S. 496 (1987).

[142] *Booth*, 482 U.S. at 503.

[143] *Id.* at 508. Quoting an earlier decision, Justice Powell stated that "the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion'." *Id.* (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).

[144] *Booth*, 482 U.S. at 519 (Scalia, J., dissenting). Justice Scalia also argued that in addition to moral guilt, society also provides a death penalty in response to the "full reality of human suffering the defendant has produced." *Id.* at 520 (Scalia, J., dissenting).

[145] *Id.* at 519 (Scalia, J., dissenting).

judgment as to the punishment he deserves.[146] The amount of harm a criminal has caused to innocent members of society is at least as relevant to whether or not he merits death as are the particular personal hardships which led to his initial criminal activity.[147] The principle that moral guilt is the only determining factor "does not exist, neither in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court."[148]

Barely four years later, Justice Scalia's reasoning triumphed in *Payne v. Tennessee*,[149] where a 6–3 majority of the Court overruled *Booth* and held that a victim impact statement is admissible to remind the sentencer that "'just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'"[150] In permitting the sentencing jury to hear that a surviving child missed his mother and baby sister who had been murdered by the defendant, the Court stated, "there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant."[151] The Court impliedly accepted Justice Scalia's argument that nothing in the language of the Eighth Amendment prevented the use of victim impact evidence and specifically stated that, prior to *Booth*, no opinions of the Court had forbidden them.[152]

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[146] *Id.* at 520 (Scalia, J., dissenting).

[147] *Booth*, 482 U.S. at 520 (Scalia, J., dissenting). Framing his argument in light of the Court's constitutional authority, Justice Scalia asserted that the issue of victim impact statements should be resolved by "the democratic processes of a free people," that by "decrees of [the] Court." *Id.* (Scalia, J., dissenting).

[148] *Id.* (Scalia, J., dissenting).

[149] 501 U.S. 808 (1991).

[150] *Payne*, 501 U.S. at 825 (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)).

[151] *Id.* at 826. The majority noted that under the Eighth Amendment a defendant receives "the broadest latitude" in admitting mitigating factors of his personality as evidence to the jury. *Id.* at 826-27.

[152] *Id.* at 822.

IV. SCALIA'S COMMITMENT TO PRESERVING THE CONSTITUTION

Justice Scalia's respect for the Constitution prevents his joining in the practice of some Justices who treat constitutional amendments as if the Justices were written in invisible ink when they become inconvenient obstacles to the results the Justices wish to reach. For example, the Eleventh Amendment provides that citizens of another state may not sue a state in federal court.[153] Its protection was extended by interpretation to also bar such suits by citizens of the same state.[154] When the question arose whether Congress had the power to create jurisdiction in the federal courts for citizens' suits against states, the Court held that if Congress acts under its power to enforce the Fourteenth Amendment, under its Enabling Clause, it may grant federal jurisdiction.[155] The Court reasoned that by ratifying the Fourteenth Amendment in 1868, seventy-three years after the ratification of the Eleventh Amendment, Congress consented to a repeal of the state's Eleventh Amendment immunity.[156]

More recently, in *Pennsylvania v. Union Gas Co.*,[157] the Court reviewed legislation that permitted citizens to sue states in federal court to vindicate rights created under the Commerce Clause contained in Article I of the Constitution.[158] Despite the fact that the Commerce Clause became effective when the Constitution was ratified in 1788, seven years *before* the ratifi-

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[153] U.S. CONST. amend. XI. The Eleventh Amendment provides that, "The Judicial power of the United states shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United states by Citizens of another state. . ." *Id.*

[154] Hans v. Louisiana, 134 U.S. 1, 20-21 (1890). The Court reasoned that allowing citizens to sue the states of which they are citizens would expose the Constitution to "a construction never imagined or dreamed of." *Hans*, 134 U.S. at 15.

[155] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). The Enabling Clause provides, "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

[156] *Fitzpatrick*, 427 U.S. at 452-53, 455-56.

[157] 491 U.S. 1 (1989).

[158] *Union Gas Co.*, 491 U.S. at 5 (1989). The legislation in question was the comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). *Id.*

cation of the Eleventh Amendment, a plurality of the Court upheld the legislation.[159] The Court found that as long as Congress made its intention clear, it could hold states liable to citizens in federal court under its Commerce Clause authority.[160]

Justice Scalia dissented, arguing that the plurality was giving no weight to the principle of state sovereign immunity enshrined in the Eleventh Amendment.[161] Unlike Congress' Fourteenth Amendment power granted subsequent to the Eleventh Amendment, there is no justification for limiting states' immunity "through appeal to *antecedent* provisions of the Constitution."[162]

Only seven years later, a majority of five members of the Court finally agreed with Scalia and overruled *Union Gas* in *Seminole Tribe v. Florida*.[163] Writing for the Court, Chief Justice Rehnquist stated:

> Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.[164]

The opinion in *Seminole Trade* referred frequently to Justice Scalia's dissent in *Union Gas*, including his belief that the decision in *Union Gas* was at variance with the long history of Supreme Court decisions upholding state sovereign immunity. "If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court

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[159] *Id.* at 19.

[160] *Id.* at 7, 22-23.

[161] *Id.* at 44-45 (Scalia, J., dissenting). Scalia reasoned that the majority's decision in effect rendered the fundamental doctrine of sovereign immunity as explained in *Hans* and at least 17 other cases, insignificant. *Id.* at 35, 44 (Scalia, J., dissenting).

[162] *Id.* at 42 (Scalia, J., dissenting) (emphasis added).

[163] 116 S. Ct. 1114, 1131 (1996).

[164] *Seminole Tribe*, 116 S. Ct. at 1131-32.

unless Congress clearly says so, it means nothing at all."[165]

V. CONCLUSION

Antonin Scalia has shown himself to be a worthy successor to Oliver Wendell Holmes. Both jurists acknowledge that it was not without purpose that the Constitution of the United States was reduced to writing and, in that form, presented to the States for ratification. They recognize that law is to be made by the political branches, not the courts, and that Justices of the Supreme Court do not sit as a roving commission of constitutional text revisionists. Notably, the dissenting opinions of Holmes and Scalia have been similarly effective in often convincing their fellow Justices of the soundness of their approach to constitutional decisionmaking. If the extent of this influence merits the title "great" then both are deservedly termed "great dissenters."

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[165] *Id.* at 1127 (quoting *Union Gas Co.*, 491 U.S. at 36 (Scalia, J., dissenting)).

BECOMING BLACK IN AMERICA: A BOOK REVIEW ESSAY OF *LIFE ON THE COLOR LINE* BY GREGORY HOWARD WILLIAMS

Alfreda A. Sellers Diamond[*]

I. INTRODUCTION

Life on the Color Line chronicles the life of Gregory Howard Williams.[1] The book asks important questions about the social consequences and the significance of racial designation, particularly, what it means to live life as a black child in this country.[2] Dean Williams' memoir, however, reveals the question from a different vantage point, in that he explores the question from the perspective of a child who comes to his blackness from whiteness. In approaching the question of the significance of racial designation from this point, *Life on the Color Line* offers an opportunity to revisit the immediate pre-*Brown v. Board of Education*[3] era of *Plessy v. Ferguson*,[4] when the law of the land "was separate but equal," and the immediate post-*Brown* era, when living life as a black child in

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[1] Gregory Howard Williams is currently Dean of Ohio State University School of Law. He was born in 1943 in Virginia.

[2] *Life on the Color Line* is one of several books detailing the lives of children who have struggled with questions of racial identification. *See generally*, SHIRLEE TAYLOR HAIZLIP, THE SWEETER THE JUICE (1994); JAMES MCBRIDE, THE COLOR OF WATER (1996); SCOTT MINERBROOK, DIVIDED TO THE VEIN: A JOURNEY INTO RACE AND FAMILY, (1996); BARACK OBAMA, DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE (1995).

[3] 347 U.S. 483 (1954).

[4] 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

this country presented that child with many struggles in life. The black child's struggles for educational, economic, social and political success had to be addressed in a social context within which that child was not particularly valued. In revisiting this time period, *Life on the Color Line* also allows us to reflect and question whether, within the last forty-three years of the post-*Brown* era, *Brown* has permeated the general fabric of American society, and whether the ideal of equal opportunity has found its way into all facets of African-American life—the social, the economic, the political, as well as the educational. In so questioning, *Life on the Color Line* serves as a fulcrum for evaluating whether *Brown* has functioned as a catalyst for the dismantlement of the racially differential attitudes and policies which stifled the development of African-American people across generations.[5]

II. THE TRANSFORMATION

From the date of his birth until 1954, Gregory lived his life as one of four children in a working class family. He had been born white in the middle America of the late 1940s and early 1950s. The highlights of his life should have been fairly predictable. He may have been a part of a two-parent household, with his mother present in the home and his father being the breadwinner,[6] and he should have expected to grad-

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[5] RICHARD KLUGER, SIMPLE JUSTICE 748 (1975) (explaining how *Brown* signalled beginning of nation's effort to rid itself of racism).

[6] It is reported that a statistically significant number of female-headed households are headed by black women which may result in the "feminization of poverty." NATIONAL RESEARCH COUNCIL, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 523-25 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989). According to the census bureau, some important differences can be seen within families. The census Bureau defines a family as "two or more people who live in the same household and are related by blood, marriage, or adoption." *Id.* at 519. The family may consist of a married couple, female-headed families, or male-headed families:

> While similar trends are evident for both whites and blacks, the timing and magnitude of change differ. In 1940, husband-wife families made up about 76 percent of all black families and 85 percent of all white families. From 1940 to the late 1950s, the proportion of black families head-

uate from high school,[7] attend college,[8] and marry someone of a similar educational and ethnic background.[9] Gregory was born white; therefore, he should never have expected to experience the humiliations of a Jim Crow America,[10] the daily assaults, some major and minor, of being a person of color,[11] nor should the duality of life experienced by blacks in America have been a part of his life.[12] However, in *Life on the Color Line*, Gregory Howard Williams describes growing up in an extended family environment that created a strange twist in what should have been a relatively ordinary life.

Gregory's family environment was steeped in mystery and secrecy. In detailing his early life, Dean Williams speaks of family conversations that would end with "some abrupt silence

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> ed by a woman remained roughly constant at 19 percent; by 1960 that proportion had risen only slightly to 22 percent. But during the next 25 years the percentage of black families headed by women doubled, to 44 percent. In 1940, the proportion of white families headed by women was 10 percent; by the mid 1980s, it had increased only slightly, to 13 percent.

Id.

[7] *Id.* at 336. In 1950, approximately 23% of black women and 22% of black men had twelve or more years of education, whereas approximately 55% of white women and 53% of white men had twelve or more years of education. *Id.*

[8] *Id.* at 339. It is reported that fewer than 2% of black men and women had completed college in 1940; however, during this same reporting period, approximately 5% of white women and 7.5% of white men had completed college. *Id.* Between 1940 and 1960 there was some improvement in the number of blacks who had completed college with more than 5% having completed college by 1960. *Id.* at 339-40.

[9] *Id.* at 136-38.

[10] *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1957).

[11] *See generally* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

[12] W.E.B. Dubois speaks of the "peculiar sensation" of the "double consciousness" of blacks in America:

> this sense of always looking at one's self throughout the eyes of others, of measuring one's soul by the tap of a world that looks on in amused contempt and pity. One ever feels his two-ness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 9 (1993).

when [he] entered a room filled with relatives."[13] The secret was revealed to Gregory when, at the tender age of ten, he became black.[14] One moment he was "white,"[15] and the next

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[13] GREGORY HOWARD WILLIAMS, LIFE ON THE COLOR LINE, at 16.

[14] In 1954, when the country was awaiting the Supreme Court's decision in *Brown v. Board of Education*, how do you tell a ten year old child that he is black when it is possible for the highest court of the land to reaffirm that "legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences?" *See* Plessy v. Ferguson, 163 U.S. 537, 551 (1896). Dean Williams recounts the discovery of his place along the color line:

> Remember Miss Sallie who used to work for us in the tavern? *** It's hard to tell you boys this, [B]ut she's really my momma. That means she's your grandmother.
> But that can't be, Dad! She's colored! I whispered, lest I be overheard by the other white passengers on the bus.
> That's right Billy, he continued. She's colored. That makes you part colored, too, and in Muncie you're gonna live with my Aunt Bess. . . . "

WILLIAMS, *supra* note 13, at 33.
Gregory's immediate reaction was to quickly review all of the facts of his life as he then knew them:

> I didn't understand Dad. I knew I wasn't colored and neither was he. My skin was white. All of us are white, I said to myself. But for the first time, I had to admit Dad didn't exactly look white. His deeply tanned skin puzzled me as I sat there trying to classify my own father. Goose bumps covered my arms as I realized that whatever he was, I was. I took a deep breath. I couldn't make any mistakes. I looked closer, His heavy lips and dark brown eyes didn't make him colored, I concluded. His black, wavy hair was different from Negroes' hair, but it was different from most white folks' hair, too. He was darker than most whites, but Mom said he was Italian. That was why my baby brother had such dark skin and curly hair. Mom told us to be proud of our Italian heritage! That's it, I decided. He was Italian. I leaned back against the seat, satisfied. Yet the unsettling image of Miss Sallie flashed before me like a neon sign. Colored! Colored! Colored!

Id.

[15] Dean Williams describes the perception he had of himself as a child after discovering that he was really black:

> I refused to believe Dad. I looked at [my brother.] His skin, like mine, was a light, almost pallid, white. He had Dad's deep brown eyes, too, but our hair was straight . . .
> No! I answered, still refusing to believe. I'm not colored, I'm white! I look white! I've always been white! I go to "whites only" schools, "whites only" movie theaters, and "whites only" swimming pools! I never had heard anything crazier in my life! How could Dad tell us such a mean lie!

he was black, and somehow this change in reality made a difference.[16] By most state statutes on the subject of racial classification,[17] and most social conventions,[18] Gregory was black because he was the paternal grandson of a white man and a black woman.[19] It mattered not that as far as anyone knew, all of his other relatives were white. Gregory's mother had left the family unit, leaving two of her black children, Gregory and his brother Mike, with their father. Gregory's father was unable to care for the two boys alone, and his white grandparents had no desire to assume the responsibility of their black grandchildren. In order to survive, Gregory's father had to find someone to assist him with long-term child care for the two boys. Once the secret was revealed and the necessity of the moment required the allegiance and the physical presence of black women in order to maintain Gregory's life, he had to become black.[20] "Passing"[21] was no longer an

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WILLIAMS, *supra* note 13, at 33-34.

[16] Gregory's father spoke of this difference, "Life is going to be different from now on. In Virginia you were white boys. In Indiana you're going to be colored boys. I want you to remember that you're the same today that you were yesterday. But people in Indiana will treat you differently." *Id.* at 33.

[17] *See infra* notes 55-84 and accompanying text.

[18] *See infra* notes 28-54 and accompanying text.

[19] Gregory's paternal grandmother, Sallie Williams, had been an employee of his white grandfather when she became pregnant with Gregory's father, James Anthony Williams. WILLIAMS, *supra* note 13, at 32-34. James Anthony Williams married Mary Cook Williams, a white woman, who was Gregory's mother. *Id.* at 3, 22. If calculated mathematically, these facts would have made Gregory one-fourth black and three-fourths white.

[20] At first, Gregory's father delivered him to the door of Aunt Bess, who decided that she could not tolerate the responsibility of two young boys. *Id.* at 33. Gregory's father then persuaded his grandmother to assume the responsibility for the boys; however, she proved incapable of managing the task. *Id.* at 57. Dean Williams credits his survival to Mrs. Dora Terry Smith, a woman unrelated to him, who allowed Gregory to live with her until adulthood. Dora Terry Smith characterized herself as Gregory's "truly mother." *Id.* at 265-85, 282.

[21] "Passing" is a common way for African-Americans of very light skin color to alter their identity and transfer to the white community. VIRGINIA R. DOMINGUEZ, WHITE BY DEFINITION 161 (1986). Virginia Dominguez makes the following comment with respect to the phenomenon: "The social, economic, and political consequences of this change of social identity are so great for the individuals involved that people are unwilling to divulge information to strangers about those who

option. This stark confrontation with the color line, in the image of Gregory's black "mothers,"[22] would not accommodate the hidden color any longer. The only alternative for Gregory's father was to seek assistance from relatives on the black side of the color line, a choice which required a concession—living as a black child in middle America circa 1954.[23]

Gregory's transformation from white to black was, of course, not the result of a change in the actual *facts* of his existence or caused by some alleged mistake of *fact*. Rather, it was a change in the *practice* of who Gregory was, a change which had been brought about by the necessity of circumstance.[24] This change in the "theory" of who he was and how

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have passed or who are currently in the process of passing for white." DOMINGUEZ, *supra* at 200.

[22] Depending on how the term is used, the social characterization of the concept of "mother" may occupy a place of reverence or may represent an entanglement of pathology in a child's life. "White" mothers have been privileged to carry a badge of honor as they have been portrayed as members of the "true cult of womanhood." BELL HOOKS, AIN'T I A WOMAN 70 (1981). Historically, "Black" mothers, have not been able to ascend to this status, and as mothers, they have been relegated to social images of Aunt Jemimas, Sapphires, or Amazons. These were images of women totally dedicated to the white children in their care, often to the detriment of their own children. *Id.* at 70-73. The most recent popular images of black mothers cast them as "welfare queens" and members of the "underclass." Alfreda A. Sellers Diamond, *Disposable Children in Black Faces: The Violence Initiative as Inner City Containment Policy,* 62 UMKC L. REV. 423, 453 (1994). *See generally* Martha L. Fineman, *Images of Mothers in Poverty Discourses,* 42 DUKE L.J. 274 (1991). There is an irony in the exchange of images in the person of Gregory's white mother, who rejected him and his black mothers, who helped him "become" black.

[23] This choice was fraught with dangerous possibilities. During this time, the social conventions of many places in the country required a firm delineation between white women and black men in all areas of life. For the black male, childhood offered no protection from the wrath of white men for crossing the color line and violating social restraints on the governance of black male behavior. Witness the fate of Emmitt Till, a 14 year old black male, who in 1955 was lynched for reportedly whistling at a white woman. *See generally* STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE CHOICE OF EMMITT TILL (1988).

[24] Gregory's story can be contrasted with the plaintiffs' in seven Louisiana cases. The plaintiffs in these cases had been assigned their racial designation as "Negro" in contravention to their perceptions of themselves. Although the plaintiffs had lived their lives as white children, the State of Louisiana classified them as black children. The plaintiffs filed mandamus actions to compel the state to assign them the racial designation of white on their birth certificates. *See* Plaia v.

he perceived himself cost him what one writer has called a "property interest" in whiteness.[25] In crossing the color line, he joined the numbers of black children who struggled with all the social baggage that "coloredness" brought to a child's life, accompanied by the perplexity and the duality of phenotypic whiteness.[26] The context for understanding the significance of

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Louisiana State Bd. of Health, 296 So. 2d 809, 809-10 (La. 1974); Doe v. State, 479 So. 2d 369, 370 (La. Ct. App. 1985); Thomas v. Louisiana State Bd. of Health, 278 So. 2d 915, 915-16 (La. Ct. App. 1973).

[25] Homer Plessy, the plaintiff in *Plessy v. Ferguson*, claimed that the reputation of being white was "property" in the same manner as a right of action or an inheritance. Plessy v. Ferguson, 163 U.S. 537, 549 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954). *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993). One writer suggests that most of the time whites do not think of themselves in racial terms. She identifies this as the "transparency phenomenon": "[t]he tendency of whites *not* to think about whiteness or about norms, behaviors, experiences, or perspectives that are white specific." Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminating Intent*, 91 MICH. L. REV. 953, 957 (1993). When the existence of "whiteness" or the existence of benefits coincident with whiteness are threatened, such as attacks on affirmative action or the political recognition of the "angry white male," the "transparency phenomenon" is replaced by a clear vision of the usefulness of "whiteness" as a claim of entitlement or right. *See also* Adarand Constructors v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996); Richard Delgado, *Rodriguez' Eleventh Chronicle: Empathy & False Empathy*, 84 CALIF. L. REV. 61 (1996). *See generally* Sheila Jackson Lee, *Incidents Show We Still Need Affirmative Action*, HOUSTON CHRON., Nov. 15, 1996, at 47; Richard Morin, *Study Sheds Light on Male Misperception*, DALLAS MORNING NEWS, Jan. 27, 1997, at 8C; Clarence Page, *Affirmative Action Will End But Its Lessons Won't*, HOUSTON CHRON., Jan. 26, 1997, at 3; David Sarasohn, *Money Talks and Votes*, THE PORTLAND OREGONIAN, Dec. 29, 1996, at 4C; Susan J. Tolchin, *Message Behind the Low Voter Turnout*, ROCKY MOUNTAIN NEWS, Dec. 2, 1996, at 37A.

[26] *See generally* BLACK CHILDREN: SOCIAL, EDUCATION AND PARENTAL ENVIRONMENTS (Harriette P. McAdoo & John L. McAdoo eds., 1985). Dean Williams reports of the many daily reminders of being a biracial child in a racially divisive atmosphere. He reports of being ostracized and beaten up by black children because he looked white. White children harassed him because by rule of law, he was black. School officials gave him differential treatment, both in academics and athletics, because he was the black child of black and white parents. He was instructed by old teachers to inform new teachers, who might be caught unaware, that he was really black! If he dated a white girl, he would be subject to detention, interrogation, and castigation by teachers; however, because he looked white, he would be subject to harassment if his dates were ostensibly black. *See general-*

Gregory Howard Williams' overnight transformation from white to black requires an understanding of the concept of race as a social construction and the underlying significance of skin color as its proxy in American history.[27] The beginnings of these understandings have their aegis in the development of European colonial expansionism dating from the 15th century.

III. The Historical Perspective For Understanding The Social Concept of Race

Throughout their world explorations, Europeans came into contact with a wide variety of racially and culturally different peoples.[28] Most often, the Europeans were technologically and militarily stronger than the non-whites they encountered during their explorations.[29] They attributed these variations in color and culture, most particularly the differences between the light-skinned Europeans and the dark-skinned Africans to biological origins.[30] These "biological differences" were interpreted hierarchically, with certain classes of differences ranking above others.[31] The combined effects of military superiority and physical difference fostered the attitude that darker skin color coincided with inferior human status.[32]

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ly WILLIAMS, *supra* note 13.

[27] *See generally* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (Richard Delgado & Jean Stefancie eds., 1996).

[28] The idea of "race" as a method of differentiating among people is a European concept dating from the fifteenth century. *See The Enduring Inequalities of Race in* RACE 2-11 (Steven Gregory & Roger Sanjek eds., 1994); BENJAMIN B. RINGER & ELINOR R. LAWLESS, RACE-ETHNICITY AND SOCIETY, 87-93, 95-96 (1989).

[29] *See generally* RINGER & LAWLESS, *supra* note 28; PETER KOLCHIN, AMERICAN SLAVERY: 1619-1877 (1993).

[30] *See generally The Enduring Inequalities of Race in* RACE, *supra* note 28; KOLCHIN, *supra* note 29.

[31] WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, 216-18 (1968). *See also The Enduring Inequalities of Race in* RACE, *supra* note 28, at 3-8; H. EDWARD RANSFORD, RACE AND CLASS IN AMERICAN SOCIETY: BLACK, LATINO, ANGLO 3-8 (1994).

[32] BASIL DAVIDSON, THE AFRICAN SLAVE TRADE 23-27 (1961). *See also* JORDAN, *supra* note 31, at 28-43 (stating that Africans were considered to be human, but they were humans of much lower order, more animal in nature); KENNETH M.

From the time the first Africans were brought to this country in 1619, they were subjected to economic, social and political systems which were designed to maintain a dominant-subordinate relationship. The development of the American system of slavery obviously founded the primary system for maintaining white dominion over Africans in America. Slaveholding was believed to be essential to the maintenance of the social, political and economic well-being of the slaveholding states.[33] Both slaveholder and slave were served by the institution of slavery. The slave was assured of salvation from his heathenish nature, and the slaveholder, who was an integral part of the economic infrastructure of the country, was assured of a cheap source of labor.[34]

The American attitude toward slavery owes its understandings to the English conceptualization of chattel slavery. Simply stated, the African was black because he had been cursed by God.[35] His coloring and appearance bore a resemblance to the apes of his native land and served as evidence of his condemnation to this station in life.[36] Moreover, since the slave had been sentenced to this status by God, it was inevitable that his dark skin color alone would become a proxy and continuing explanation for his subjugation in America, even long after the legal structure of slavery disappeared.[37]

The colonial legal system required that a firm separation of the color line between black and white be maintained on

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STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 8-10 (1956).

[33] ROBERT W. FOGEL, WITHOUT CONSENT OR CONTRACT 34-40 (1989). *See also* EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH (1965).

[34] *See generally* STAMPP, *supra* note 32.

[35] Supposedly, the African dark skin bore the mark of Noah's son, Ham, who had been cursed by God for his sins. JORDAN, *supra* note 31, at 27-32.

[36] JORDAN, *supra* note 31, at 28-32. The African deserved slave status. The African was a "savage" who could only be "tamed by being enslaved." William Harper, *Memoir on Slavery in* THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830-1860 at 89 (Drew B. Faust ed., 1981). *See also* Sellers-Diamond, *supra* note 22, at 442-43.

[37] A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 39 (1978).

both social and political grounds. Politically speaking, the legal regime of American chattel slavery was based on the subordination of an entire group of people, and to operate smoothly, it required a social component that facilitated the distinction between the subordinate and the superior. On legal, political and social bases, the proxy for making the distinctions was skin color. Skin color was to be feared. The transferability of skin color from those who were black to those who were white was a focus of legislation, both during the institution of slavery and after its demise. Much of the political rhetoric, as well as many of the legal regimes, were particularly focused on the regulation of sexual activity between blacks and whites.[38]

Although the United States ended its participation in the international slave trade on March 2, 1807, this was only a reflection of the African slave population's ability to replenish itself from within the domestic population of the United States.[39] During the period of legal slavery in America, the question of who was a slave could be presumptively answered by the examination of skin color. Dark skin color was a proxy for identifying an individual as a slave. More specifically, if the individual was not ostensibly white, the individual was presumptively a slave.[40] The matrilineal nature of the des-

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[38] Antimiscegenation laws were enacted to prohibit sexual activity between blacks and whites. The African male and female were viewed as being hypersexual. Much anti-abolitionist rhetoric drew a picture of the free black male as a threat to the purity of the white woman and the white race. Slavery was therefore a necessity of justice, humanity, purity and order. *See* Harper, *supra* note 36, at 82-97, 130-31; JORDAN, *supra* note 31, at 136-50; HIGGINBOTHAM, *supra* note 36, at 42; ROBERT J. SICKELS, RACE, MARRIAGE, AND THE LAW 123 (1972). An example of punishment for crossing the color line occurred in 1630 in the Virginia Colony. As punishment for sexual involvement with a black woman, a white man suffered a public whipping. It was reported that he was to be whipped "before an assembly of Negroes and others for abusing himself to the dishonor to God and shame of a Christian by defiling his body in lying with a Negro." SICKELS, *supra* at 123. Criminal sanctions were levied in Virginia for fornication and intermarriage between blacks and whites and could be punished by involuntary servitude or banishment. *Id.*

[39] STAMPP, *supra* note 32, at 25.

[40] The case of *Gentry v. McMinnis* exemplified the legal problem. Gentry v.

ignation "slave" brought with it a life sentence to that station in life.[41]

When the de jure system of slavery was abolished, it became necessary to enact other methods of identifying who was "black" in order to properly place them within the appropriate sphere of economic, political and social designation.[42] The need to classify individuals as members of the appropriate racial group during the post-Civil War period was inextricably intertwined with the racial attitudes of the late nineteenth-century.[43] The need to identify some as "black" and others as "white" was a manifestation of white supremacists' propositions about the nature of individuals belonging to respective groups and their corresponding social, economic and political worth.[44] Additionally, ideas concerning the relative inferiority of those properly identified as black corresponded with the ascendance of Darwinian theory during the late nineteenth-

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McMinnis, 33 Ky. 382 (1835). In this case, the plaintiff instituted an action claiming freedom from her slave master. *Gentry*, 33 Ky. at 382. The law of Kentucky stated that if an individual's complexion was black or mulatto, this would be evidence that the person was a slave. *Id.* at 385. Being a mulatto or having at least one-fourth African blood also indicated that the person was a slave. *Id.* The converse was also true—having less than one-fourth African blood was prima facie evidence of freedom. *Id.* In *Ex Parte Leland*, a South Carolina court held that the word "negro" had the fixed meaning of "a slave." *Ex parte* Leland, 1 Nott & McCord, 460, 462 (S.C. 1819). In order for the presumption to apply, the individual had to appear to be black phenotypically. *Id. See also*, Harold Cohen, Note, *An Appraisal Of the Legal Tests Used To Determine Who Is a Negro*, 34 CORNELL L.Q. 246, 248 (1948).

[41] A Virginia statute required that "all children borne in this country shall be held bond or free only according to the condition of the mother." Act XII, 2 Laws of Va. 170 (Hening 1823) (enacted Dec. 1662) (repealed).

[42] Cohen, *supra* note 40, at 249. The southern states consistently felt the need to legislate racial identification during the post-Civil War period. *Id.*

[43] *See* generally 6 ANTI-BLACK THOUGHT 1863-1925: THE BIBLICAL AND "SCIENTIFIC" DEFENSE OF SLAVERY: RELIGION AND "THE NEGRO PROBLEM" (John David Smith ed., 1993).

[44] Images of the relative inferiority of blacks were deeply embedded in the national psyche. Sellers-Diamond, *supra* note 22, at 442-45. Ideas that blacks were intellectually inferior, sexually hyperaggressive, immoral, and slovenly were widely accepted in all regions of the country. *Id. See also* 7 ANTI-BLACK THOUGHT 1863-1925: RACIAL DETERMINISM AND THE FEAR OF MISCEGENATION PRE-1900: RACE AND "THE NEGRO PROBLEM," at 297, 321 (John David Smith ed., 1993).

century and early twentieth-century.[45] The resultant political, social and economic impact of this movement required more formalized concepts for determining who would be relegated to specific racial castes.[46]

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[45] *See generally* CHARLES DARWIN, THE ORIGINS OF SPECIES (1859). Darwinian theory would support the proposition that white subjugation of blacks was a result of one group's ascendance and the other's descendence in the natural order of life; a fact caused by the superiority of the white race over the black race. RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 6 (1944).

[46] The Civil War had been a costly proposition for both the North and the South. Claudia Golden, *The Economics of Emancipation*, *in* WITHOUT CONSENT OR CONTRACT: CONDITIONS OF SLAVE LIFE AND TRANSITION TO FREEDOM at 614-28 (1992). The political rhetoric of the day blamed the economic conditions in the South on the competition between black men and white men for scarce economic resources. *See generally* WILLIAM J. WILSON, THE DECLINING SIGNIFICANCE OF RACE (1930). An immediate political goal of some late nineteenth-century politicians was to take away political and economic power from blacks who had recently experienced new freedoms during the period of reconstruction in order to reduce the amount of economic competition with white working class men. *Id.* at 56. Wilson reasoned that "economic dislocation (caused by industrial capitalism, population pressures, declining farm prices, and exploitative sharecropping) generated a labor reform movement and Jim Crow segregation that grew hand in hand. *Id.* at 57. Fredrickson reasoned that the competition for scarce resources in the South coupled with the decline of agricultural productivity invited racists explanations for the South's economic shortcomings. GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY 1817-1914, at 262 (1971). Similar effects could be seen in non-slave holding states prior to the civil war. LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860, at 158-59 (1961). In times of economic crisis, those who are least able to compete in the market, those whom society has relegated to the margins of economic and political arenas, find themselves to be at the center of the debate when there are economic downturns. There exist parallels to this phenomenon in current social contexts. For example, a current popular reference to "welfare queens" is frequently cited in such a manner that one would expect that this group of women, whose face is usually depicted as black, was solely responsible for the entire national deficit of the country. Sellers-Diamond, *supra* note 22, at 452. Derrick Bell recognizes this phenomenon in the political rhetoric of the day which is evinced by the "racial bonding" of whites who "stand together against the Willie Hortons, or against racial quotas, or against affirmative action." DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMEANCE OF RACISM 9 (1992). Professor Bell states:

> The code words differ. The message is the same. Whites are rallied on the basis of racial pride and patriotism to accept their often lowly lot in life, and encouraged to vent their frustration by opposing any serious advancement by blacks. Crucial to this situation is the unstated understanding by the mass of whites that they will accept large disparities in

The immediate post-Civil War period between 1865-1868 was one of social and economic unrest in the white Southern community. The post-Civil War period presented white America with the problem of what to do with the newly freed slaves. Many feared that the African would now seek retribution against his former owner, and there were suggestions that there should be a voluntary repatriation of the African American to Africa.[47] Although the official badges of slavery had been abolished, the country nevertheless succeeded in the perpetuation of the pre-Civil War social order—a social order which had been created through the imagery of the Africans as individuals who were less deserving of the full rights of citizenship in this country.[48] During the period between the end of the war and the enactment of the Fourteenth Amendment, southern states passed laws to regulate the relationship between blacks and whites.[49] Although the end of the Civil War

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economic opportunity in respect to other whites as long as they have a priority over blacks and other people of color for access to the few opportunities available.

Id.

[47] SHADES OF BROWN: PERSPECTIVES ON SCHOOL DESEGREGATION 31-33 (Derrick Bell ed., 1980).

[48] These racial images were necessary to maintain the relationships of dominance and oppression that existed between African-Americans and whites. Furthermore, the racial imagery was effective because it exerted profound social weight. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?*, 77 CORNELL L. REV. 1258, 1262-63 (1992).

[49] *See* GILBERT T. STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW, 35-63 (1910); RANSFORD, *supra* note 31, at 15-16. *See generally*, THEODORE B. WILSON, THE BLACK CODES OF THE SOUTH (1965). Some statutes sought to regulate the physical movement of blacks from one place to another. *See generally* STEPHENSON, *supra* note 50. Other statutes sought to regulate the ability of blacks to participate in specific trades and occupations or sought to require that they receive permits to work at certain jobs. *Id.* at 41-43. *See also* FREDERICKSON, *supra* note 46, at 262-65. Prior to 1865, it was easy to regulate the movement of blacks because of the strict rules placed on them by the institution of slavery. For example, the slave codes of the various states would not permit the slave to leave the owner's plantation without a pass which gave the owner's specific permission. *See* MISS. REV. CODE Chap. 73, §§ 3, 9 (1824); TENN. CODE tit. 5, ch. 2 § 2603 (1858); HIGGINBOTHAM, *supra* note 39, at 39-40, 170-71. However, the post-slavery South had to deal with millions of free moving blacks. This presented a

had achieved a tokenized freedom for blacks, it had not presented blacks with the indicia of social, political and economic benefits associated with the citizenship of those who possessed white skin.[50] Jim Crow laws,[51] restricted voting rights,[52] anti-miscegenation laws,[53] and lynchings[54] were legal and extra-legal political and social tools of control, all designed to direct the destinies of individuals who were determined by some rule of thought or law to be "black."

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problem of control that could only be solved by very specific regulations governing the daily lives of blacks: who they could marry, where they could go to school, where they could work, where they could live, where they could die, where they could receive medical treatment, etc.. . . *See generally* HIGGINBOTHAM, *supra* note 38; WILSON, *supra* note 47.

[50] *See generally* RANSFORD, *supra* note 31.

[51] *See generally* WOODWARD, *supra* note 10. Jim Crow laws were racial segregation laws that forbade blacks from obtaining public accommodations, services, and education with whites. WOODWARD, *supra* note 10, at G7. Jim Crow has been characterized as something greater than just a system of laws:

> Jim Crow established an etiquette of discrimination. It was not enough for blacks to be second class citizens, denied the franchise, and consigned to inferior schools. Black subordination was reinforced by a racialist punctilio dictating separate seating on public accommodations, separate water fountains and restrooms, separate seats in courthouses, and separate Bibles to swear in black witnesses about to give testimony before the law. The list of separations was ingenious and endless. Blacks became like a group of American untouchables, ritually separated from the rest of the population.

Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 264-65 (1983).

[52] Poll taxes, literacy tests, grandfather clauses (which had as a qualification for voting, a provision requiring that one's grandfather be eligible to vote) and white primaries were the legal measures used to disenfranchise newly enfranchised blacks. Blacks were not allowed to vote without these legal encumbrances to the process until the passage of the Voting Rights Act of 1965. NATIONAL RESEARCH COURSE, *supra* note 7, at 231-32.

[53] SICKELS, *supra* note 38, at 64-67. *See generally* Paul A. Lombardo, *Miscegenation, Eugenics and Racism: Historical Footnotes to* Loving v. Virginia, 21 U.C. DAVIS L. REV 421 (1988).

[54] Over 728 lynchings of men, women, and children were documented during the last 10 years of the nineteenth-century. PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN OF RACE AND SEX IN AMERICA 17-31 (1984).

IV. WHY NOT WHITE?

A. The History of Racial Classification Laws in America

Arguably, since race is a socially constructed phenomenon,[55] one's classification as a member of any particular racial group should largely be a function of self-identification.[56] Under this logic, Gregory should have been able to choose the racial designation of "white" or "black." In the past, however, it has been the courts who have been called upon to determine the racial classification of individuals as a matter of fact and law, both in the civil and criminal law contexts.[57] The matter was not left to individual choice. The court's job of statutory interpretation could not have been more difficult, given the current means of determining who should be designated a member of a particular racial group, particularly when one comes to understand the amorphous nature of the social construction of the idea of race.[58]

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[55] LOPEZ, *supra* note 27, at xiii.

[56] *Id.* at 190-95. *But see also*, Carol R. Goforth, *"What is She?" How Race Matters and Why it Shouldn't*, 46 DEPAUL L. REV. 1, 9 (1996) (stating our society is based on racial classifications).

[57] *See* Cohen, *supra* note 40, at 251. Statutory schemes purporting to define a racial classification have often been created in order to properly identify an individual as a member of a class which occupies a marginal sociological and economic status. As a result, one will find a number of statutes which attempt to define the classification of "Negro." These statutes were most often designed to disadvantage or punish individuals in the class. An example is the Alabama case of *Thurman v. State*, 18 Ala. 276 (1850). The statute in question stated that "every slave, free Negro or mulatto, who committed the crime of rape on a white female and was convicted was to suffer death." *Thurman*, 18 Ala. at 278. The court had to classify the defendant as either a slave, free Negro or mulatto, in order for the statute to apply to the defendant's case. *Id.* In making its evaluation as to whether the defendant was a descendant of "negro stock" and therefore a "mulatto," the state put on evidence regarding the kinkiness of the defendant's hair as well as the yellow tint of his skin. *Id.* The presence of kinky hair and yellow skin was persuasive, not determinative. The court defined a mulatto as "a person that was the offspring of 'negroes' by a white man or of a white woman by a negro." Because the defendant was a quadroon, the statute was inapplicable to his case. *Id.* at 279. As one can see, the penalties for the crime would have been harsher had the defendant been classified as black.

[58] *See generally* Payhter et al., *The Landscapes of the W. E. B. DuBois Boy-*

When the interpretation and application of racial classification laws have been at issue, some courts have allowed jury inspection of the individual sought to be identified,[59] jury inspection of the individual's relatives,[60] testimony of the individual's relatives,[61] drawings,[62] testimony of ethnologists,[63] and evidence of community reputation.[64] The most

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hood Homesite: An Agenda for An Archaeology of the Color Line, in RACE 285 (Steven Gregory & Roger Sanjek eds. 1994).

[59] Jones v. State, 47 So. 100, 102 (Ala. 1908). In this case, a woman who was thought to be white was presented to the jury for visual inspection so that the jury could determine whether or not she was white. *Jones*, 47 So. at 102. This factual determination was necessary in order to convict the woman and man of miscegenation. *Id. See also* Weaver v. State, 116 So. 893 (Ala. App. 1928) (holding black man and white woman violated laws prohibiting miscegenation).

[60] *Weaver*, 116 So. at 895.

[61] *Id.*

[62] Stultz v. Cousins, 242 Fed. 794, 797 (6th Cir. 1917). If the race of the individual was in doubt, very often the question concerned whether the individual was black; especially in a case where one might be deceived into believing that the individual was white. *Stultz*, 242 Fed. at 797. In such a case, the individual's relatives might be brought before the jury for visual examination. *Id.* In *Stultz*, a crayon portrait of the plaintiff's uncle and his white wife was admitted into evidence as proof that the plaintiff himself was white, while a letter was offered as contradictory evidence that the plaintiff was one-fourth black. *Id.*

[63] Ethnologists might be summoned to give expert testimony concerning the common anthropological characteristics of certain cultural groups. They might give an opinion based on an examination of the individual or the individual's family in order to classify the individual as a member of a particular racial group. Some courts have found other physical evidence to be probative as to the question of racial identity. An Arkansas court once determined that the formation of the black person's foot was distinct and therefore probative evidence of race. Daniel v. Guy, 23 Ark. 50, 52 (1861). A man "suspected of being a Negro" should remove his shoes and show the jury his feet. *Daniel*, 23 Ark. at 51-52. *See also* Green v. City of New Orleans, 88 So. 2d 79 (La. App. Orleans, 1956) (asserting that lips, ears and pigmentation are distinctive of Negro ancestry).

[64] Weaver v. State, 116 So. 893, 895 (Ala. App. 1928). In *Sunseri v. Cassagne*, Cyril Sunseri sought to annul his marriage on the grounds that his wife, Verna Cassagne Sunseri had a traceable amount of Negro blood. Sunseri v. Cassagne, 185 So. 1, 2 (La. 1938). Verna Cassagne Sunseri, in turn, offered evidence that her ancestors worshiped in a White church, she had been educated in white schools, she had received her first communion in a White church, her first child had been delivered in a white maternity ward, she rode in public accommodations reserved for white people, she and her husband attended white movie theaters and hotels, and all their friends were white. *Sunseri*, 185 So. at 4-5. The court required proof beyond doubt in order to change the racial designation from white to Negro. *Id.* at 5. In *Hopkins v. Bowers*, the North Carolina Supreme Court

common state regulations governing racial classification laws were contained within statutory definitional schemes. When a state crafted a racial classification law, the law generally affected blacks and whites in matters of family relations,[65] education[66] and transportation.[67] Statutory definitions of

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evaluated the validity of a marriage where the wife was "suspected" of being of mixed blood. Hopkins v. Bowers, 16 S.E. 1 (N.C. 1892). The statute in question prohibited the marriage between a white person and a person of "negro descent." *Hopkins*, 16 S.E. at 1. The court admitted evidence attesting to the fact that the woman in question was 'colored" because she usually associated with colored people. *Id.* at 2.

[65] *See generally* SICKELS, *supra* note 38. In Arkansas, concubinage between a person of the Caucasian race and a person of the Negro or Black race was a high misdemeanor punishable by one month to one year in a penitentiary at hard labor. ARK. STAT. ANN. Chap. 109, section 4, 9 (1858). Under the statute, a person of the Negro race was any person who had in his or her veins "any negro blood whatever." *Id.* In Mississippi, "the marriage of a white person and a negro or mulatto or person who shall have 1/8 or more negro blood, or with a Mongolian or a person who had 1/8 or more mongolian blood, was unlawful and void." MISS. CODE ANN. Chap. 90, § 2859 (1892). *See also* VA. CODE ANN. Chap. 41, § 10 (1835); VA. CODE ANN. Chap. 42, § 17 (1835). As late as 1958, adoption statutes in Louisiana, Texas and South Carolina made it illegal for any white person having custody, control or care of a white child to give the child permanently to a black person. *Legal Definition of Race*, 3 RACE RELATIONS L. REP. 571, 580 (1958).

[66] Pre-*Brown* cases concerning the exclusion of black children from white schools because of race reflected the application of statutes which were very stringent in deciding who was actually "black." *Legal Definition of Race,* supra note 65, at 582-83. The amount of non-caucasian "blood" which could make a child "too black" to attend school with white children was very small. *Id.* at 583. Generally, statutes which regulated in this area excluded children with "any Negro blood" from white schools. *Id.*

[67] *Id.* In many states, Jim Crow statutes required separate waiting rooms and coaches in conveyances for blacks and whites. *Id.* Since the determination of who was white or black in these cases needed to be determined in haste, the standards used to place an individual in the appropriate black area required a rather low threshold of identification for "Negroid characteristics." *Id.* at 583-84. An example of this problem was presented in the case of Lee v. New Orleans Great N. R. Co., 51 So. 182 (La. 1910). In *Lee*, the statute in question defined a "colored" person as one "with any appreciable mixture of negro blood." *Lee*, 51 So. at 183. The petitioners' daughters were ejected from a passenger train when they refused to move to the coach reserved for "colored" people. *Id.* The court heard evidence that the maternal grandfather was of "mixed blood" and had such reputation and reception in the community. *Id.* at 184. Therefore, although phenotypically white, the "admixture" of Negro blood required that the girls sit in the colored section. *Id.*

race commonly focused on the phenotypic appearance of the individual, the individual's bloodline, or his ancestry.[68] The "blood" classification determined the racial status of an individual by proportioning or percentaging the amount of traceable "blood" in the individual's lineage.[69] The "ancestry test" designated the racial status of the individual by examining whether a particular ancestor of the statutorily targeted group was present at any degree of relation or was present within a specific number of generations.[70] The phenotypic appearance of an individual might be used as the test of racial identification if the government's need for classification was of an immediate nature, thereby dispensing with a prolonged fact-finding process.[71] In questionable cases, whether one fell vic-

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[68] *Legal Definition of Race, supra* note 66, at 575.

[69] *Id.* at 573. An Alabama statute required "if any white person and any negro, or the descendent of any negro intermarry, or live in adultery or fornication with each other, each of them shall on conviction be imprisoned in the penitentiary for not less than two nor more than seven years." ALA. CODE Chap. 187, § 5001 (1928) (repealed). The Alabama legislature also defined "mulatto," or "person of color," as a person of mixed blood and included it within the definition of "negro." ALA. CODE ANN., Chap. 1, § 25 (1928) (repealed). Similarly, a Florida statute stated the words "negro," "colored," "colored persons," "mulatto," or "persons of color," when applied to an individual "included every person having 1/8 or more of African or negro blood." FLA. REV. GEN. STAT. tit. 1, Chap. 1, § 1 (1927) (repealed). The legislature took a different approach and defined "white" as "persons of white or caucasian race, who had no ascertainable trace of either Negro, African, West Indian, Asian, Indian, Mongolian, Japanese, or Chinese blood in their veins." GA. CODE ANN. § 53-312 (1933) (repealed).

[70] *The Legal Definition of Race*, *supra* note 68, at 574.

[71] *Id.* Definitions of who was black in the instance of miscegenation laws or public education tended to be more precise. An example is given in State v. Treadaway, 126 La. 299, 322 (1910):

> The term "colored" as applied to race was given the meaning of the word 'negro' for the very purpose of having in the language a term including within its meaning both negroes and descendants of negroes; but the converse is not true. The word 'negro' was never adopted into the language for the purpose of designating persons of mixed blood.
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> ***
>
> The person too black to be a mulatto and too pale in color to be a negro is a griffe. The person too dark to be a white and too bright to be a griffe is a mulatto. The quadroon is distinctly whiter than the mulatto. Between these different shades we do not believe there is much, if any difficulty in distinguishing.

tim to the statute's designation of blackness was a question of fact,[72] a fact that most individuals under scrutiny would never wish to have resolved against them.[73] The case of Homer Plessy is one such example.

B. Plessy v. Ferguson*: The Embodiment of Inferior Image*

In 1896, Homer Plessy, donning a badge of racial superiority, claimed that he was seven-eighths white and only one-eighth African, and was, therefore, deserving of the privilege of riding in the white railway car under Louisiana law.[74] He was denied access to the white railway car because of the tinge of African blood coursing through his veins.[75] He was to

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Treadway, 126 La. at 322. *See also* MISS. CONST. of 1892, art. 14 § 263 (wherein 1/8 requirement and prohibition for marriage did not apply to constitutional requirements for separate schools for black and white children). Instead, as far as school segregation was concerned, the word "white" meant a member of the white race and the word "colored" included not only Negroes but persons of mixed blood having any appreciable amount of Negro blood. *Id. See also* Rice v. Gong Lum, 104 So. 105 (1925); VA. CODE ANN. § 20-54 (Michie 1924). For the purposes of marriage regulation, a "white person" was one who had no trace whatever of any blood other than Caucasian. *Id.* Additionally, persons who were 1/16 or less of American Indian were deemed white persons. *Id.*

[72] The court in *Lee v. New Orleans Great Northern Railroad* stated:

> On the question of race there is no legal presumption either way. The issue [is] one of fact, to be determined not only by evidence of the admixture of negro blood, but by evidence of reputation, of social reception, and of the exercise of the privileges of a white man.

Lee v. New Orleans Great N.R.R., 125 La. 236, 240 (1910).

[73] *See generally* Doe v. State, Through the Dept. of Health & Human Resources, 485 So. 2d 60 (La. 1986); State *ex rel.* Plaia v. Louisiana State Bd. of Health, 296 So. 2d 809 (La. 1974); Messina v. Ciaccio, 290 So. 2d 339 (La. Ct. App. 1974); Thomas v. Louisiana State Bd. of Health, 278 So. 2d 915 (La. Ct. App. 1973);

[74] Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

[75] Homer Plessy was an "octoroon," meaning that one of his great grand parents must have been black. *Id.* at 538. It should be noted, however, that anyone who was of Negro descent under Louisiana law was classified as a Negro for the purpose of enforcing Jim Crow laws. *Id.* at 541. *See generally* Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255 (1983). Under a similar analysis of Gregory Howard Williams' genealogy, he would have been a

be tried for violation of the statute, but he sought a writ of prohibition against the trial judge.[76] The writ was denied by the Louisiana Supreme Court and the United States Supreme Court affirmed, finding no Fourteenth Amendment violation in the Louisiana statute.[77] Pinning in place Plessy's insignia of racial subservience, the Court adopted what has come to be known as the "separate but equal" doctrine. The Court said:

> The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.[78]

Finally, in passing upon the argument that the enforced separation of African Americans and whites stamped African Americans with a badge of inferiority,[79] the Court said:

> If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.[80]

Narrowly interpreted, *Plessy* would have been little more than a public accommodations case. However, it was interpreted broadly in order to justify segregation in many facets of everyday life. During the post-*Plessy*, pre-*Brown* era, segrega-

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quadroon, meaning that one of his grandparents was black. He would be one-fourth black and three-fourths white, quantifiably, more white than black.

[76] *Plessy* 163 U.S. at 538.

[77] *Id.* at 552.

[78] *Id.* at 554.

[79] *Id.* at 551.

[80] *Id.* at 551-52.

tion was the rule in public accommodations, hotels and restaurants, hospitals, housing, departments of the United States Government, and even the gallery of the United States Senate.[81] Moreover, since it was designated as a proper function of the state's police power,[82] segregation in public life, accompanied by the imprimatur of the state, was used to justify the "separate but equal" doctrine in public education.[83] The doctrine of *Plessy* remained the constitutional standard for judging the legitimacy of state actions regarding segregation policies for 58 years, until the Court's decision in *Brown*.[84]

V. Balancing on the Color Line: Between *Plessy* and *Brown*

It was during the eve of *Plessy* and the dawn of *Brown* that Gregory Howard Williams made his transformation and crossed the color line to blackness.[85] Even though the hope of *Brown* was that it would have a far reaching effect and dispense with the need for racialized decision making, the fact was that Gregory still lived in a time when social conventions and legal regimes mandated that he be black. One overriding theme comes through in *Life on the Color Line*, particularly when viewed through the prism of the *Plessy-Brown* paradox, as well as through a review of state racial classification laws. That theme

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[81] School Desegregation, Past, Present, and Future 7-8 (Walter G. Stephan & Joe R. Feagin eds., 1980).

[82] *Plessy*, 163 U.S. at 544.

[83] *See generally* School Desegregation, Past, Present and Future, *supra* note 81, at 7. Measurements of the status of African Americans in public education within 29 years after *Plessy* revealed that separate and *unequal* was the rule. Removing a Badge of Slavery: The Record of Brown v. Board of Education, xix (Mark Whitman ed., 1993). In 1929, the state of Alabama was spending $36 each school year per white student. However, it was spending only $10 each year per black student. *Id.* In Arkansas, even though African Americans were 23% of the school population, they only received 12% of the funds. *Id.* During that same year, statistics for Florida, Georgia, and Louisiana showed a 4 to 1 differential advantaging whites in school funding. *Id.*

[84] 347 U.S. 483 (1954).

[85] Gregory had lived as a black child in an America governed by the rule of *Plessy v. Ferguson* for approximately four months when *Brown v. Board of Education* was decided on May 17, 1954.

is this: children with black heritage, even those who were the "least black" in appearance, like Gregory, carried with them a social taint that could not be erased by family ties with white heritage. Implicit in the racial classification law was the idea that the presence of any black blood was critical. By social standards, any amount of black blood was too much; therefore Gregory could not remain part of his white family. Whiteness carried the indicia of privilege, promise and hope, while blackness carried only despair.[86]

"One drop"[87] of black blood would have made Gregory black. Phenotypically, Gregory could have "passed" as white if his economic, social and family structure had remained intact.[88] However, with the common knowledge of his parentage within his immediate community, as well as his association with black relatives, passing would have been impractical. Rejected by white relatives because of the fear of taint, he was relegated to a place in the black community of the 1950s—poverty stricken and with few opportunities for success. In this context, Gregory's childhood, as described in *Life on the Color Line*, provides an opportunity to question whether the

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[86] Dean Williams recounted the immediate contrasts between his existences upon crossing the color line. As he crossed, he looked forward and he looked backwards. He then reflected on what he saw:

> We followed the alley to Monroe Street. As we trudged south, I realized I'd never seen so many black people in Muncie before. What bothered me most, however, was the tattered, down-at-the heels feel of the neighborhood. The contrast with Grandpa and Grandma Cook's sparkling white two-story home in the new Mayfield Addition was striking. Here, gloomy weather-beaten houses tottered on crumbling foundations. Exposed two-by-fours propped sagging porches. . .
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> 'This is the Projects, boys,' Dad explained. 'Colored families live on this side of Madison, and crackers on the other. Stay outta there. If the crackers learn you're colored, they'll beat the hell out of you. You gotta be careful here, too. Coloreds don't like half-breeds either.'

WILLIAMS, *supra* note 13, at 38.

[87] The idea of the potency of black blood had its derivations in racial classification laws which varied from precise percentages designating one as black to laws which required the designation with any visible admixture of black parentage. *See supra* notes 59-73 and accompanying text.

[88] *See generally* VIRGINIA R. DOMINGUEZ, WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA (1986).

promise of *Brown* has modified the social or cultural necessity of properly identifying children as "black," in order to catalog them for easy social access. Has the promise of *Brown* had the broad and generalized effect on the lives of black children as had been predicted?

VI. Evaluating the Effectiveness of *Brown* as a Tool for Total Dismantlement of Racism

It was the goal of the plaintiffs in *Brown*[89] to attack segregation by attacking the public school system.[90] It has been forty-three years since the *Brown* Court announced that the doctrine of "separate but equal"[91] had no place in public education and therefore was no longer constitutionally justifiable.[92] The Court found that state-required separate schools for black children and white children were inherently unequal.[93] With this announcement, the Court denied the states the constitutional authority to pin a badge of inferiority upon African-American children by legally requiring them to attend segregated schools—school assignments which had been made simply on the basis of black skin color.[94]

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[89] 347 U.S. 483 (1954).

[90] *See generally* Brown v. Board of Education, The Challenge for Today's Schools (Ellen Condliffe Lagemann & LaMar P. Miller, eds., 1996); Michael W. Combs, *The Supreme Court and African-Americans: Personnel and Policy Transformations,* 36 How. L.J. 139, 151 (1993).

[91] The "separate but equal doctrine" popularly characterizes the United States Supreme Court opinion in Plessy v. Ferguson, 163 U.S. 537 (1896). *See supra* notes 28-54 and accompanying text.

[92] *Brown*, 347 U.S. at 495.

[93] *Id.*

[94] The *Brown* Court found that:

> To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Id. at 494.
This finding of the *Brown* court was supported by social science research. Kenneth A. Clark and Mamie P. Clark, *The Development of Consciousness of Self and the Emergence of Racial Identification in Negro Preschool Children*, 10 J. Soc. Psych. 591-99 (1939); Kenneth A. Clark & Mamie P. Clark, *Racial Identification and Pref-*

The *Brown* decision came at a time when African Americans had begun to insist that America recognize the mote in her own eye. The United States had been a decisive figure in World War II, leading the allied forces in a quest for freedom, and defeating Nazi Germany, a country which had committed human rights atrocities against millions of people based on notions of racial, ethnic and religious superiority. Yet, here on this continent, America had yet to face and defeat a demon which had plagued the country for over two hundred years.[95]

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erence in Negro Children in READINGS IN SOCIAL PSYCHOLOGY 169 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947); Kenneth A. Clark & Mamie P. Clark, *Emotional Factors in Racial Identification and Preference in Negro Children.* The Clarks presented the evidence of their now famous "doll study" in which young black children were asked to respond to a number of questions involving choices between black, brown and white dolls. *Id.* It was their conclusion that black children in America would fare better psychologically if they had social contact with white children at a young age. *Id. See also* A. LEON HIGGINBOTHAM, JR. SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 8-10 (1996); DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 8-9 (1995); Skelly Wright, *Public School Desegregation, Legal Remedies for De Facto Segregation, in* THE EVOLVING CONSTITUTION, ESSAYS ON THE BILL OF RIGHTS AND THE U.S. SUPREME COURT 44, 48-49 (Norman Dorsen, ed. 1987); Charles Lawrence, *"One More River to Cross"—Recognizing the Real Injury in Brown: A Prerequisite to Shaping New Remedies, in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 49, 50-54 (Derek Bell ed., 1980); Sara Lawrence Lightfoot, *Families as Educators: The Forgotten People of Brown in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 3, 5-8 (Derek Bell ed., 1980). The validity of studies which suggest that black children demonstrate a poor self-concept and lack self esteem because of segregated school environments have been challenged. Algea O. Harrison, *The Black Family's Socializing Environment in* BLACK CHILDREN: SOCIAL, EDUCATIONAL AND PARENTAL ENVIRONMENTS 174, 175-79 (Harriette Pipes McAdoo & John L. McAdoo eds., 1985); Nancy H. St. John, *The Effects of School Desegregation on Children: A New Look At The Research Evidence, in* RACE AND SCHOOLING IN THE CITY 84, 90-92 (Adam Yarmolinsky, et al., eds. 1981).

[95] The Supreme Court's post-World War II civil rights decisions in *Shelley v. Kramer*, 334 U. S. 1 (1948), *McLaurin v. Oklahoma*, 339 U. S. 637 (1950), *Sweatt v. Painter*, 339 U. S. 629 (1950) and finally *Brown v. Board of Education*, represent what one author calls a "cold war imperative." Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 61 (1988). Professor Dudziak describes the foreign policy difficulties encountered by the United States in seeking to act as a post World War II leader and proponent of democracy in other parts of the world as antithetical to its active practice of racial oppression of African Americans. *Id.* at 6-15. Racial segregation supported by state statutory and state constitutional definitional schemes affected African Americans in some of the

That demon was the legacy of racism which had spawned from slavery—racism which had been responsible for continuing human rights violations against America's own citizens of color.[96]

In *Brown*, the United States Supreme Court recognized the power of education in a child's development by acknowledging that education is one of the most important functions of state and local governance.[97] The fact that school attendance in many states was compulsory necessarily emphasized the importance that the states attached to this service.[98] Moreover, in order to become a good citizen, one needed a good educational foundation.[99] Education's inculcative function was vital in "awakening the child to cultural values, . . . and in helping him to adjust normally to his environment."[100] Finally, in laying to rest the "separate but equal" doctrine, the Court instructed the states, that should they provide public education to any they had the constitutional duty to provide equal educational opportunities to all.[101]

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most important areas of life: housing, education, voting, public accommodations, and military service. *See supra* notes 55-73 and accompanying text. *Brown v. Board of Education* provided the United States with an opportunity to quell some of the criticism from the international community regarding de jure racial segregation which had created an inferior status for African Americans. Dudziak, *supra* at 6-15. *See also* Michael J. Klarman, *Brown, Racial Change, and The Civil Rights Movement*, 80 VA. L. REV. 7, 7-8 (1994). *See generally* A. RUSSELL BUCHANAN, BLACK AMERICANS IN WORLD WAR II (1975); NEIL A. WYNN, THE AFRO-AMERICAN AND THE SECOND WORLD WAR (1975).

[96] In 1947 and 1951, petitions were presented to the United Nations charging the United States with human rights violations and genocide. Dudziak, *supra* note 95, at 94-97. These charges were based upon the government sanctioned segregative treatment of African Americans in all areas of life: housing, education, public accommodations, lynchings of African Americans as extra-judicial punishments for crimes, and the denial of the right to vote. *Id.* The United Nations failed to act on these petitions. *Id.* at 96. *See generally* DAVID CUSHMAN COYLE, THE UNITED NATIONS AND HOW IT WORKS 84-85 (1965); CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (1970).

[97] *Brown*, 347 U.S. at 493.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

It was this pronouncement by the Court that has been recognized by one writer as representing a redefinition of "black bodies" which now were "reborn under a new law."[102] Richard Kluger characterizes the *Brown* decision as a critical jurisprudential moment when "[t]he Negro could no longer be fastened with the status of official pariah," when "no longer could the white man look right through him as if he were [invisible]."[103] Indeed, it was this claim to the value of education that allowed Gregory Howard Williams, now black, to claim his blackness and at the same time refuse to accept the limitations others would have placed on him due to this status. As an individual, Gregory seized the promise of *Brown* and ultimately obtained an undergraduate degree from Ball State University, a Masters Degree from the University of Maryland, and a Master of Philosophy, Ph.D., and Juris Doctorate degrees from George Washington University.[104] Standing alone, these accomplishments were markers which would suggest that the post-*Brown* era, at least for this individual, created an environment in which he could realize the promise of *Brown*.

VII. The Continuing American Dilemma: Do We Live in a Color-Blind Society Under the Governance of a Color-Blind Constitution?

At the close of the twentieth-century, the broad reaching and permeating effects of *Brown* have not come to fruition. The persistence of the dilemma is evidenced by the promulgation of a neo-racial classification system characterized by the perpetuation of the images of African-American inferiority in the national psyche. For example, one poll of non-black Americans has recently shown that fifty-three percent of non-blacks believe that African Americans are less intelligent than whites.[105] Fifty-one percent believe blacks are less patriot-

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[102] Richard Klugar, Simple Justice 749 (1975).

[103] *Id.*

[104] Association of American Law Schools, The AALS Directory of Law Teachers 1019 (1997-98).

[105] Studs Terkel, Race: How Blacks and Whites Think About the Ameri-

ic.[106] Fifty-six percent believe that blacks are more prone to violence and sixty-two percent believed that blacks would rather live on welfare than work.[107]

The existence and the development of this neo-racial classification system had been predicted during the post-*Brown* era. Following the urban uprisings of 1967, the "Kerner Commission"[108] determined that our nation was one moving toward two societies, one black, one white—separate and unequal."[109] This insidious division along class and race lines was a result of a continuing "legacy of past discrimination in the forms of segregation and poverty [which] had created a black ghetto whose environment was destructive to many of its inhabitants."[110] The Commission's report recognized *Brown*'s promise as a platform from which African-Americans might elevate their social, political and economic achievements.[111] At the same time, however, the Commission recognized that the persistence of poverty in the black inner city might limit the realization of a broader and more generalized effect from *Brown*.[112]

CAN OBSESSION at v (1992) (quoting 1990 University of Chicago's National Opinion Research Center survey).

[106] *Id.*

[107] *Id.*

[108] Former Illinois governor Otto Kerner chaired a national advisory committee appointed by President Lyndon B. Johnson in 1968 to report on the racial conflicts that occurred the previous year. *See* REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS at xvii (1968).

[109] *Id.* at 1.

[110] A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY at x (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989).

[111] REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, *supra* note 108, at 25-26.

[112] *Id.* at 25. The Commission recognized the phenomenon of "racial isolation". in which urban children would be deprived of "one of the more significant ingredients of quality education: exposure to other children with strong educational backgrounds." *Id.* at 427. Coupled with the widely held perception that inner-city schools were necessarily inferior, racial isolation would result in the inability of the children attending these schools to maintain "confidence in their ability to shape their future." *Id.* Moreover, the Commission felt that an increase in political power in the African-American community would not serve as a total solution to these problems because of the inability of African-American elected representatives to increase taxes, which was needed to generate reserve for the improve-

The Kerner Commission's report was reflective of Gunnar Myrdal's recognition that the persistent problem of race in America, a dilemma which had it origins in the country's policy of racial difference, has generated a plethora of related social problems.[113] Now, twenty-six years after the Kerner Commission, the persistence of the dilemma is evidenced by the status of African-American children who are subjected to many of the problems that occur at the intersection between race and class in American society.[114] For example, in comparison to other children, African-American children stand a greater likelihood of being unemployed and are more likely to be involved in the criminal justice system.[115] Reports from the criminal justice system demonstrate that black children may be subject to differential arrest practices,[116] delinquency referral practices,[117] and delinquency admissions,[118] all of which are factors which contribute to their disproportionate representation with-

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ment of urban schools. The commission suggested that federal funding for education, housing, employment, job training, and social services be significantly increased in an attempt to counter the effects of "racial isolation." *Id.* at 23-29. Full integration of America's public schools was determined to be the appropriate solution. *Id.* at 25.

[113] GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY at lxxi (1944).

[114] Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity, Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241-45 (1991). On March 1, 1998, the Eisenhower Foundation is due to release the 30th anniversary update of the Kerner Commission Report. *Two Societies*, NEWSWEEK, Feb. 23, 1998, at 6. The Foundation concludes that the "prophecy has come to pass" and cites the following evidence: 1) the unemployment rate for young men in inner cities is over 30 percent while the national rate is under 5 percent; 2) one percent of Americans have more wealth than the remaining 90 percent; 3) one in three young black men is in prison, on parole or probation; and 4) states currently spend more per year on prisons than higher educations. *Id.*

[115] U.S. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 420 (1995); *See also* YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES xiii (Jewelle Taylor Gibbs et al., eds., 1988).

[116] AN ENDANGERED SPECIES, *supra* note 116, at 146.

[117] MICHAEL LYNCH & E. BRITT PATTTERSON, RACE AND CRIMINAL JUSTICE 89 (1991).

[118] AN ENDANGERED SPECIES, *supra* note 116, at 147.

in the juvenile justice system.[119] According to statistics, six million young black males between the ages of 15 and 24 are more likely to be involved in the criminal justice system than would their correlative age group in 1960.[120] As of 1988, black youths constituted over half of the youth population in juvenile detention facilities on any given day.[121] These statistics suggest that although there have been improvements in the educational progress of African-American children since *Brown*, other significant problems remain.[122]

Today, the constitutional debate on the issue of "race" is dominated by the discussion of color-blindness.[123] Although individuals may act based on race-based stereotypes or prejudices in their personal endeavors, governmental actors may not

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[119] *Id.*

[120] *Id.* at xiii.

[121] *Id.* at 295.

[122] *See generally* A COMMON DESTINY, *supra* note 6, at 332-79 (demonstrating racial inequalities continue to exist between blacks and whites).

[123] In his dissenting opinion to *Plessy v. Ferguson*, Justice Harlan stated:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color blind,* and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

Plessy v. Ferguson, 163 U. S. 537, 559 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954) (emphasis added). *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 1-6 (1992); Paul Finkleman, *The Color of Law*, 87 NW. U. L. REV. 937, 937 (1993) (reviewing ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992)) (suggesting that Justice Harlan wrote of Constitution as it should be, "not as it was"); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (holding all racial classifications imposed by any government actor must be analyzed under strict scrutiny). *See generally* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) (asserting that there should be no suspicion when group controlling decision-making process acts to benefit minority and disadvantage itself); Finkleman, *supra* note 124, at 943 (suggesting equal protection may include affirmative action programs because of equality of results); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 755-84 (1985) (discussing various race-conscious measures taken by Congress during Reconstruction).

consider race in classifying individuals, absent compelling reasons, whether to act in a manner detrimental to their interests[124] or to bestow a benefit upon them in order to counter the effects of past discrimination.[125] Nowhere is this debate more profound than in the affirmative action cases of the last twenty years, and most recently in the Fifth Circuit decision, *Hopwood v. Texas*.[126]

Making a great leap backwards, the Fifth Circuit Court of Appeals held in *Hopwood* that the University of Texas Law School could not constitutionally use race as a factor in the law school admissions process.[127] Genealogically, *Hopwood* can be

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[124] *See* Korematsu v. United States, 323 U.S. 214, 219 (1944) (holding military order detaining all Americans of Japanese descent during World War II constitutional at "time it was made"); Hirabayashi v. United States, 320 U.S. 81, 101 (1943) (holding curfew imposed against persons of Japanese ancestry did not unconstitutionally discriminate against Japanese Americans).

[125] *See Adarand*, 515 U.S. at 224 (holding all racial classifications imposed by any government actor are subject to strict scrutiny); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 507-08 (1989) (holding that race-based city program for construction contracts did not pass strict scrutiny); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1977) (holding special admissions programs for minority applicants to state medical school unlawful).

[126] 78 F.3d 932 (5th Cir. 1996) *reh'g denied*, 84 F.3d 720, 721 (5th Cir. 1996); *cert. denied*, 116 S. Ct. 2581 (1996).

[127] The court reasoned that the accomplishment of diversity was not a compelling governmental interest despite the contrary words of *Bakke* to that effect. *Hopwood*, 78 F.3d at 944. The Fifth Circuit posited that Justice Powell's discussion of diversity as a compelling governmental interest had not garnered a majority vote of the Court; therefore, the notion of diversity as a compelling governmental interest was merely a viewpoint, not the law. *Id.* According to the *Hopwood* court, the use of race *per se* as a plus factor would be proscribed; however, the law school could consider factors which might have some correlation with race as a constitutional part of the admissions process. *Id.* at 946. The Fifth Circuit said: "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Id.* (quoting Metro Broadcasting, Inc. v. FCC, 494 U.S. 547, 602 (1990) (O'Connor, J., dissenting)). In essence, the conclusion of the *Hopwood* court embraces the notion of the colorblind Constitution. For a different view see generally Andy Portinga, *Racial Diversity as a Compelling Governmental Interest*, 75 U. DET. MERCY L. REV. 73 (1997) (analyzing compelling interest component of *Hopwood*); Erin M. Hardtke, Note, *Elimination of Race as a Factor in Law School Admissions: An Analysis of* Hopwood v. Texas, 80 MARQ. L. REV. 1135 (1997) (supporting Fifth Circuit's treatment of United

traced to *Brown*, where the constitutional subject also involved a discussion of the meaning of "constitutional equality" and the means by which it may be achieved.[128] Jurisprudentially, however, *Hopwood* seems to have been less influenced by *Brown* and more in line with the recent spate of affirmative action cases which have focused on the costs to those negatively affected by the governmental action under scrutiny, rather than on the benefits to those who were to be advantaged by the governmental action.[129] *Hopwood* provides a current context within which we can examine how the color-blindness rhetoric of today has altered the ability of the courts to visualize what equality looks like and how to remedy its deprivation.[130]

States as nation of one race).

[128] *Brown* is part of the family of post-World War II, civil rights opinions in which the Court interprets the Fourteenth Amendment's meaning of equality in regard to educational pursuits. *See also* McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637, 642 (1950) (holding segregation policy at state-supported graduate school in violation of equal protection); Sweatt v. Painter, 339 U. S. 629, 636 (1950) (holding law excluding admissions to state-supported law school based on race violated equal protection); *see generally* Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189, 213 (1973) (holding school board had affirmative duty to desegregate school system if found to have history of deliberate racial segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (holding that district courts have broad remedial powers to eliminate state-imposed segregation in public schools); Green v. County School Bd., 391 U.S. 430, 438-39 (1968) (holding school board has burden to provide realistic and immediate plan to achieve nondiscriminatory unitary system).

[129] *See Croson*, in which the Court essentially states that there can be no constitutionally "benign" discrimination: "Absent searching judicial inquiry into the jurisdiction of such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 448 U.S. at 493. *But see* United Jewish Org. v. Carey, 430 U.S. 144, 175-78 (1977) (Brennan, J., concurring) (discussing concept of "benign discrimination").

[130] The two constitutional disabilities presented by the ideas of the "color blind" constitution and the inability or unwillingness of the courts to recognize the existence of "unconscious racism" in the decision-making process of governmental actors reflect the difficulty of not only proving claims of racial discrimination but also in achieving effective and dynamic remedies. Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987).

VIII. The Appropriate Context for Understanding *Brown*

Some have questioned whether *Brown* could practically foster changes in the overall status of all African-American children in this country.[131] Indeed, some have questioned whether utilizing the quest for full integration of public schools as the chief method of obtaining educational equity has served the best interests of African American children, particularly in light of current social policies which may be antithetical to equality of educational opportunity.[132] Still others have suggested that African-Americans may have suffered greater educational losses than gains, especially during the earliest phases of integration.[133] In order to gain a perspective on the value of

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[131] *See infra* note 135.

[132] One criticism of current educational policy is that the goal of equal educational opportunity has become superimposed on the method of its accomplishment—specifically, full desegregation of public schools. *See* Robert L. Carter, *A Reassessment of Brown v. Board, in* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 21, 27-28 (Derek Bell ed. 1980). Others criticize current social policies which reflect a movement towards "New Federalism" ideals, "social triage," and the "individualization and privatization of the public interest." Marguerite Ross Barnett, *Education Policy Trends In A Neoconservatism Era, in* BLACK EDUCATION (Willy DeMarcelle Smith & Eva Wells Chunn eds. 1989) at 36-46. Educational equity concerns have changed in light of "[t]he contraction of the public sphere and the definition of what constitutes the legitimate public interest." *Id.* 36-46. This change is evidenced in the "push to abolish the federal Department of Education and [the channeling] of money to the states in block grants, thereby removing education concerns from the federal sphere." *Id.* at 43. The idea of "'social triage' suggests that some children are socially unsavable through governmental intervention, therefore those resources can be better used elsewhere." *Id.* at 44. *See also* Alfreda A. Sellers-Diamond, *Disposable Children in Black Faces: The Violence Initiative as Inner-City Containment Policy,* 62 UMKC L. REV. 423, 431 (1994) (arguing that federal violence initiative devalued worth of African-American children by reinforcing stereotypes). Finally, the equal educational opportunity debate changes when the focus moves from an articulation of *group* defined rights to that of *individually*-defined rights: "[t]he denial of virtually all group rights and public responsibility to redress group discrimination, deprivation and exploitation are further examples of ignoring group goals. Instead, efforts to redress these problems are themselves attacked as inimical to the rights and essential freedom of the individual." *Educational Policy Trends in a Neoconservative Era, supra* at 44.

[133] During the first phase of integration after the *Brown* decision, black schools were often closed, black principals were demoted to the teaching ranks, and many

Brown, one must understand that the attack on segregation in public education was chosen as part of a legal strategy. It was to be but one of the initial battles in the war against governmental policies which oppressed African-American citizens. Perhaps it was unrealistic to expect that the single goal of equal educational opportunity could act as a total cure for a host of ills related to racism and the legacy of slavery. Although it cannot be denied that many individuals, such as Gregory Howard Williams, have been able to seize the promise of *Brown*, it must be acknowledged that the goal of equal *educational* opportunity was only one step towards breaking down the wall of social, political, and economic exclusion which had been built over hundreds of years of racially differential treatment of blacks. There still are many to be dismantled.

IX. Conclusion

The idea of race as a means of classifying and identifying individuals or groups is an ephemeral concept. When courts have adjudicated these matters, they have determined that the question of "race" is a question of "fact."[134] The tangible part

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black teachers were dismissed. Ed Wiley, III, *Black America's Quest for Education,* EMERGE, May 1994 at 38. In 1955, the year following the Court's opinion in *Brown*, as many as 6,000 black teachers and principals were dismissed in southern states. *Id.* Others in the supervisory ranks were not allowed to supervise white teachers in the schools that had recently been integrated. *Id.* As an example of the local community losses suffered as a result of school integration, a Race Relations Information Center study reported that during the years of 1967 through 1970, the number of black principals in North Carolina dropped from 620 to 170, in Alabama from 250 to 40, and there was virtually a total loss in Mississippi. *Id.* at 38-39. These statistics reflect a phenomenon characteristic of the implementation of school integration policy since *Brown*; policies which demonstrate that the costs and the burdens of desegregation are often disproportionately borne by African-American communities. These statistics are characterized as losses because black teachers and principals were part of the immediate local community and they knew their students as friends and neighbors. As a result, current debate on *Brown* involves the question of whether its costs outweigh its benefits. *Id.* at 38.

[134] *See* Louisiana *ex rel.* Plaia v. Louisiana State Bd. of Health, 296 So. 2d 809, 810 (L. 1974) (upholding statute which classifies persons with more than one thirty-second of negro blood as Negro); Doe v. Louisiana, 479 So. 2d 369, 372 (La. Ct. App. 1985), *cert. denied*, 485 So. 2d 60 (La. 1986) (holding family failed to

of the concept, however, is bound up in notions of skin color and group membership, whether individually claimed or collectively assigned. That Gregory Howard Williams was able to embrace his de facto assignment to "blackness" in childhood and adulthood, at a time when choosing otherwise may have been politically and economically advantageous, speaks to the larger issue of the importance of a nurturing family structure within the life of any black child. Some might have suggested to Gregory Howard Williams that it would have made more common sense, particularly in a time when being black was not a popular idea, to distance himself from the revelation as much as possible.[135] To this end, his experience stands in stark contrast to that of Susie Guillory Phipps, who, after discovering that the State of Louisiana considered her black, stated "It really shocked me. . . I was sick for three days. If you had been raised and were 48 years old and all of a sudden they tell you you have a black ancestor—it shocked me . . ."[136] Phipps asserted that she was "all white" because she "was raised as a white child," attended a "white school," and "married white

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prove parents were "white" by preponderance of evidence); Messina v. Ciaccio, 290 So. 2d 339, 342 (La. Ct. App. 1974) (requiring exact racial percentages of child's ancestry in order to determine racial classification); Thomas v. Louisiana State Bd. of Health, 278 so. 2d 915, 917 (La. Ct. App. 1973) (holding state board of health was without authority to change racial classification of woman and her children from negro to caucasian where there was room for doubt).

[135] In commenting on the plight of Susie Guillory Phipps, a Louisiana woman who sought to clear herself from the racial designation of "colored" on her birth certificate, Dr. Dan Thompson, a Dillard University Professor of Sociology said:

> I am cheering [her] on for two reasons. . . . First, she is emphasizing something we've said all along: it is a great advantage to be white in American society. It costs several thousand dollars a year to be black. Schools, clubs, economic advantages are still to this day much better if you are white. Secondly, I hope her case will dramatize the foolishness of race as a criterion in our society. I would like to see this distinction abolished. I would like to see racial designation gone. When you apply for a job and somebody asks your race, it's demeaning. What the hell difference does it make? You're an American citizen, period. Finally, I would say race does make a difference, and if I were her, by god, I'd try to get it changed, too, if I could.

Dorothy Gilliam, *Black/White*, WASH. POST, Oct. 2, 1982, at B1.

[136] Mary Schlangenstein, *Family Awaits Race Ruling*, U.P.I., Sept. 18, 1982.

twice."[137] When faced with the color in her life, Susie Guillory Phipps demanded that the State of Louisiana "take this color off" my birth certificate.[138] She was characterized, not as a black woman claiming to be white, but rather as a "white woman disclaiming to be black."[139] Gregory Howard Williams made no such request for the removal of color. Rather, he drew himself close to the "fact" of being black. In relating the experience of one individual who was required to cross the line, *Life on the Color Line* ably explores the significance of racial identity and the image of black people in this color-conscious society.

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[137] *Slave Descendant Fights Race Listing*, N.Y. TIMES, Sept. 15, 1982, at A16.

[138] Gregory Jaynes, *Suit on Race Recalls Lines Drawn Under Slavery*, N.Y. TIMES, Sept. 30, 1982, at B16. Susie Guillory Phipps requested a copy of her birth certificate in order to apply for a passport. To her surprise, she discovered the abbreviation, "col" marked in the racial designation section. She waged an eight year battle in the Louisiana courts in order to "take the color off." The Louisiana Supreme Court refused to reverse a lower court decisions which required that she demonstrate by a preponderance of the evidence that the racial designation should be changed. *See* Doe v. State, 485 So. 2d 60 (La. 1986).

[139] Jaynes, *supra* note 138.

ISO 14000 AND ENVIRONMENTAL PROTECTION

Pamela S. Evers[*]

I. INTRODUCTION

The Exxon Valdez disaster, which spilled 10.8 million gallons of crude oil onto the ecologically sensitive Alaskan coast in 1989, provided a sacrificial lamb for the environmental movement and launched a flurry of corporate and nonprofit environmental activity. Rapidly responding to the disaster, the Coalition for Environmentally Responsible Economies (CERES) announced the Valdez Principles, ten guidelines for environmentally responsible behavior.[1] In 1990, CERES began to bombard Exxon and other Fortune 500 corporations with shareholder resolutions urging them to sign the Valdez Principles.[2] Although corporate America responded negatively toward signing the Valdez Principles, there was a positive response toward the concept of environmentally responsible behavior.[3] By the end of the year, the "greening" of industry

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[1] *See* COALITION FOR ENVIRONMENTALLY RESPONSIBLE ECONOMIES, 1990 CERES GUIDE TO THE VALDEZ PRINCIPLES, *reprinted in* JOHN R. SALTER, CORPORATE ENVIRONMENTAL RESPONSIBILITY: LAW AND PRACTICE 257 (1992).

[2] *See generally* Andrew J. Hoffman, *A Strategic Response to Investor Activism*, 37 SLOAN MGMT. REV., Winter 1996, at 51 (describing influence of CERES on Amoco Corporation).

[3] *See generally* Richard A. Clarke et al., *The Challenge of Going Green*, HARV.

was well underway.

In addition to demands from citizen groups and shareholders, American multinational corporations faced emerging environmental legislation from the European Community (EC) in the early 1990s. The EC's standards body, Comite European de Normalisation, quickly developed environmentally-focused regulations regarding labeling,[4] packaging waste,[5] industry-specific imports,[6] and an overall environmental management and audit scheme (EMAS).[7] Industry and community leaders across the globe began to recognize that these legislative actions could be trade-restrictive and that careful drafting must be used to avert designation as a trade barrier.[8] The ultimate key to avoiding allegations of trade-restrictive legislation would be consumer awareness, and the organic mechanism for implementing change would be the consumer market.[9]

BUS. REV., July-Aug. 1994, at 37 (discussing "green" strategies); Art Kleiner, *What Does It Mean to be Green?*, HARV. BUS. REV., July-Aug. 1991, at 38 (discussing traits of "environmentalist" companies); Joseph Sorkis & Abdul Rasheed, *Greening the Manufacturing Function*, 38 BUS. HORIZONS, Sept.-Oct. 1995, at 17 (discussing environmentalism as method of gaining competitive edge).

[4] Council Regulation 880/92, 1992 O.J. (L 99) 1 (concerning eco-label program).

[5] *See* Sorkis & Rasheed, *supra* note 3, at 17. *See also* Michael J. Quinn, *International Environmental Law,* A.L.I.-A.B.A. COURSE OF STUDY: GOING INTERNATIONAL: FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 371, 375 (1996).

[6] An example of industry-specific regulation is found in Council Regulation 3254/91, which prohibits EC members from importing furs from countries where the use of steel-jaw leg traps is allowed. *See* Council Regulation 3254/91, art. 3, 1991 O.J. (L 308) 1.

[7] Council Regulation 1836/93, art. 3, 1993 O.J. (L 168) 3. The European Union's EMAS went into effect in 1995.

[8] *See Advisor to French Environment Ministry Offers Views on Environmental Policy and Competitiveness*, BUS. & ENVIRONMENT, Mar. 1, 1994, *available in* 1994 WL 2504991.

[9] Bruno Heintz, president of Paris-based Ecobilan, a firm that conducts lifecycle assessments, and special advisor to French Environment Minister Michel Barnier, reported, "[a]wareness means having consumers think about the entire product lifecycle to make better choices. This is a way to protect territory without using taxes or tariffs. The idea is not to restrict importation of any product, but to inform people about product lifecycles." *Id.*

Industry leaders also recognized that active participation in the movement toward environmental awareness would result in competitive advantage. Therefore, several business consortiums in the United States focused their energies on environmental issues in preparation for the United Nations Conference on Environment and Development in Rio de Janeiro (Rio Summit).[10] In 1992, multinational business consortiums, nongovernmental organizations, and governmental participants in the Rio Summit endorsed Agenda 21, the document that proclaims a vision for sustainable development in the next century.[11] One of four agreements comprising a blueprint for the future, Agenda 21 contains a strategy to set

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[10] In April of 1990, environmental managers from 21 United States companies formed the Global Environmental Management Institute (GEMI) and established principles of sustainable development. GEMI and the International Chamber of Commerce jointly developed the Business Charter for Sustainable Development in 1991. The Charter committed signatories to 16 principles of environmental management. John Holusha, *An Assembly Line Cleanup*, N.Y. TIMES, May 26, 1991, § 3, at 5. Approximately 1,000 signatories had signed the Charter by the end of 1992. *See* Catherine Cooney, *Business Groups Draft Self-Assessment Plan,* ENV'T WK., Nov. 19, 1992, *available in* 1992 WL 2655499. During that year, GEMI created their Environmental Self-Assessment Program for industry and the Bush Administration heartily endorsed the program. *Id.*

The Business Council for Sustainable Development, a consortium of businesses formed in 1991 by the Swiss venturer, Stephan Schmidheiny, suggested creating international standards that would provide guidelines for various industries to measure their environmental performance according to a standard criteria. *See also* Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479, 497 (1995).

The Chemical Manufacturing Association, reading the tea leaves, published their version of environmental initiatives in 1992 as the Responsible Care Program. This program went far beyond voicing general principles of environmental responsibility and recommended specific management practices. *Id.* at 498. Kerry E. Rodgers, Note, *The ISO Environmental Standards Initiative*, 5 N.Y.U. ENVTL. L.J. 181, 181 (1996).

[11] *See Declaration of the United Nations Conference on the Human Environment*, Principle 21, U.N. Doc. A/CONF.48/14/Rev.1 (1972), *reprinted in* 11 I.L.M. 1416 (1972). This declaration legitimized environmental policy among nations and spurred the development of environmental law. *See Report of the United Nations Conference on Environment and Development* at 398-402, U.N. Doc. A/CONF.151/26/Rev.1, U.N. Sales No. E.93.I.8 (1993); *see also* Edward A. Parson et al., *A Summary of the Major Documents Signed at the Earth Summit and the Global Forum*, ENV'T, Oct. 1992, at 12, 14-15, 34-35 (describing Agenda 21).

the environmental and development course for all nations to follow.[12] Importantly, the delegates to the Rio Summit made manifest two novel convictions: (1) international environmental standards would be invaluable tools for achieving environmental goals, and (2) business and industry would play a vital role in implementing Agenda 21.[13]

A. ISO 14000: Proponents and Critics

In response to the call for international standards and industry involvement, the International Organization for Standardization (ISO) coordinated the efforts of 118 nations in delineating a set of protocols for the implementation of a comprehensive environmental management system known as the ISO 14000 series.[14] On September 3, 1996, the ISO completed and published the ISO 14001 and 14004 environmental management standards, the first of an evolving series of protocols referred to collectively as ISO 14000.[15] ISO 14000 places con-

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[12] Agenda 21 contains 40 chapters in four sections: Social and Economic Dimensions; Conservation and Management of Resources; Human Rights and Roles of Non-Governmental Organizations; and Means of Implementation. The other three documents signed at the Rio Summit are the "Rio Declaration" (a reaffirmation of the 1972 Stockholm Declaration), the Climate Change Convention, and the Biodiversity Convention. Quinn, *supra* note 5, at 405-06.

[13] *See Report of the United Nations Conference on Environment and Development, supra* note 11, at 398-402. Agenda 21 is acknowledged as the ideological parent of ISO 14000. Nicholas A. Robinson, *The Transnational Practice of Environmental Law: Global Access and Due Diligence*, A.L.I.-A.B.A. COURSE OF STUDY: ENVIRONMENTAL LAW 123, 150, n.8 (1997). *See* INT'L ORG. FOR STANDARDIZATION, INT'L STANDARD: ISO 14001, ENVTL. MGMT. SYS., SPECIFICATION WITH GUIDANCE FOR USE, ANNEX A (1996); ISO TC 207 COMMITTEE DRAFT, GUIDE TO ENVTL. MGMT. PRINCIPLES, SYS., AND SUPPORTING TECHNIQUES 1 (1994); *see also* Paula C. Murray, *The International Environmental Management Standard, ISO 14000: A Non-Tariff Barrier or a Step to an Emerging Global Environmental Policy?*, 18 U. PA. J. INT'L ECON. L. 577, 579-80 (1997) (discussing goal of ISO standards).

[14] The International Organization for Standardization (ISO), founded in 1946, is based in Geneva, Switzerland. Generally, the organization is referred to in the United States as the International Standards Organization, which conforms to the ISO acronym. For purposes of this article, "International Organization for Standardization" will be used to identify ISO publications and the organization itself, and "International Standards Organization" will be used to identify a specific standard.

[15] *See* INT'L STANDARD: ISO 14001, *supra* note 13.

cern for the environment squarely onto the desks of business executives and government officials as a voluntary call to action.

Proponents of the ISO 14000 standards identify two primary advantages for businesses that implement the international environmental standards: (1) competitive advantage, and (2) better environmental stewardship. Competitive advantage results from an attentive response to the increasing consumer demand for compliance with regulatory and management standards, and also from cost savings inherent in enhanced control over the product life-cycle and environmental risk that is implicit in ISO 14000. Better environmental stewardship provides a philanthropic benefit to the common good. Happily an enterprising business that markets its environmental stewardship might gain further competitive advantage.

The critics of ISO 14000 point to three uncertainties concerning these standards. First, large corporate interests within industrialized nations historically have garnered the lion's share of available positions on the powerful standards-making bodies, so that non-profit organizations and developing nations have found it difficult to participate. Despite these obstacles, interested parties may yet achieve a degree of influence on the standards-making process because many of the ISO 14000 standards are incomplete and will continue to require input. Since the ISO 14000 series will have a strong impact on industry's contribution to the health of the global environment, participation by non-profit environmental organizations may prevent corporate profit motives from subsuming environmental protection interests.

The second major uncertainty concerning the creation of ISO 14000 relates to the process of certification. As with most standards promulgated by the ISO, a multinational business may request a third-party certification body to perform an assessment and audit of the firm's efforts to conform to the standards. Firms may use certification to market its products or services and gain a competitive advantage over non-certified firms. While some companies are rushing to become certified to ISO 14000, others are concluding that the certification

process is too expensive and inconsequential. Interested stakeholders must make sure the certification process is a meaningful benchmark by which industry, environmentalists, and government officials can measure a corporation's commitment to environmental stewardship, rather than mask a counterfeit impersonating the environmental champion.

The third uncertainty surrounding the ISO 14000 series is whether the standards will create non-tariff trade barriers. The ISO 14000 environmental standards are entirely voluntary on the part of industry and consumers, and they are procedural rather than substantive. Therefore, allegations of inconsistency with the General Agreement on Tariffs and Trade (GATT) should fail even if market forces create *de facto* trade barriers. Indeed, as part of an international effort to harmonize national standards and end the use of non-tariff trade barriers, the Uruguay Round of Multilateral Trade Negotiations in GATT contains two agreements that specifically address international standards: the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement).[16] Both agreements declare that national measures conforming to international standards receive a rebuttable presumption that they do not create trade barriers. Moreover, the TBT Agreement officially designates the ISO as the international body to develop relevant international standards. Despite the apparent embrace of international standards by international trade negotiators, there is still cause for concern. In particular, some nations have begun to embody international standards into substantive national trade or environmental laws or policies. If the new laws are not drafted carefully, such legislation undoubtedly will lead to valid allegations of *de jure* trade barriers.

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[16] The Uruguay Round of Multilateral Trade Negotiations in the General Agreement on Tariffs and Trade was published in 1994 as the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations," [hereinafter GATT 1994], *available in* WESTLAW, 33 I.L.M. 1125. The Final Act updated the 1947 version of GATT and established the World Trade Organization (WTO) as the formal structure for implementing GATT principles. *Id.*

B. ISO 14000: A Proposal for Action

Regardless of the uncertainties surrounding ISO 14000 implementation, the ISO 14000 series of environmental standards has significant advantages and will likely become one of the most important dynamics in international trade and the environment.[17] Since knowledge is power, the purpose of this article is to inform those interested in environmental protection and to call them to action. Those who understand and utilize ISO 14000 possess a powerful mechanism to impose their environmental agendas upon the world. The question is, who will wield this powerful tool? Stakeholders must take action to influence ISO 14000 development and implementation so that good environmental stewardship is not merely a hollow precept of the ISO 14000 series, but is the impelling force behind it.

Section II of this article describes the development of ISO 14000 standards and the fundamentals of the environmental management system. Section III examines the benefits, disadvantages, and level of acceptance of ISO 14000 through case studies and industry commentary. Section IV examines the three aforementioned uncertainties surrounding the ISO international environmental standards: 1) the potential for an unbalanced standards-setting process, 2) the potential for the certification process to devolve from a meaningful benchmark of good environmental stewardship to a veil for cloaking corporate environmental harm, and 3) the potential for raising trade barriers. Section V proposes specific recommendations for using ISO 14000 as a tool to keep the process focused on environmental protection. Section VI concludes by urging progressive business entities and environmental groups to employ ISO 14000 to their advantage to promote a healthier environment.

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[17] *Cf. ISO 14000 Poses a Challenge*, PLASTICS NEWS, May 26, 1997, at 14, *available in* 1997 WL 8489051 (discussing uncertain impact of ISO 14000 on manufacturers).

II. The Development and Fundamentals of The ISO 14000 Environmental Management System

A. International Standards

International standards were not a novel concept when the Rio Summit took place in 1992. The International Organization for Standardization (ISO) was founded shortly after World War II as a global organization to promote international standards for facilitating international trade of goods and services. Each of the 118 member nations selects a national standards organization as its representative to the ISO and policy decisions are made by a council of national standards bodies from eighteen nations. The United States has a permanent seat on the ISO governing council and is represented solely by the American National Standards Institute (ANSI).[18]

International standards are developed through a detailed procedure (see Figure 1). Technical committees (TC) develop draft standards with the aid of subcommittees and working groups. Each national standards body working in a TC may form a Technical Advisory Group (TAG) to evaluate and develop a national position on a proposed standard. National industry representatives and non-governmental organizations participate in the standards-setting process by working as a TAG member. TC members negotiate a draft standard and must approve a committee draft by consensus before presenting the draft international standard (DIS) to the ISO Central Secretariat. The Secretariat circulates the DIS to the ISO membership. If seventy-five percent of the membership votes in favor of the draft, ISO publishes the standard as a voluntary international standard.

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[18] *Reader's Report, Who Develops the ISO Standards?*, Bus. Wk., Oct. 28, 1996, at 16. ANSI represents 1600 members from American industry, trade associations and technical societies, labor and consumer organizations, and government agencies. In addition to representing the United States on international standardization activities, ANSI develops and promulgates the voluntary American National Standards. Encyclopedia of Associations, International Organizations 1995 (Part I) 691 (Jacqueline K. Barrett ed., Gale Research Inc., 29th ed. 1994).

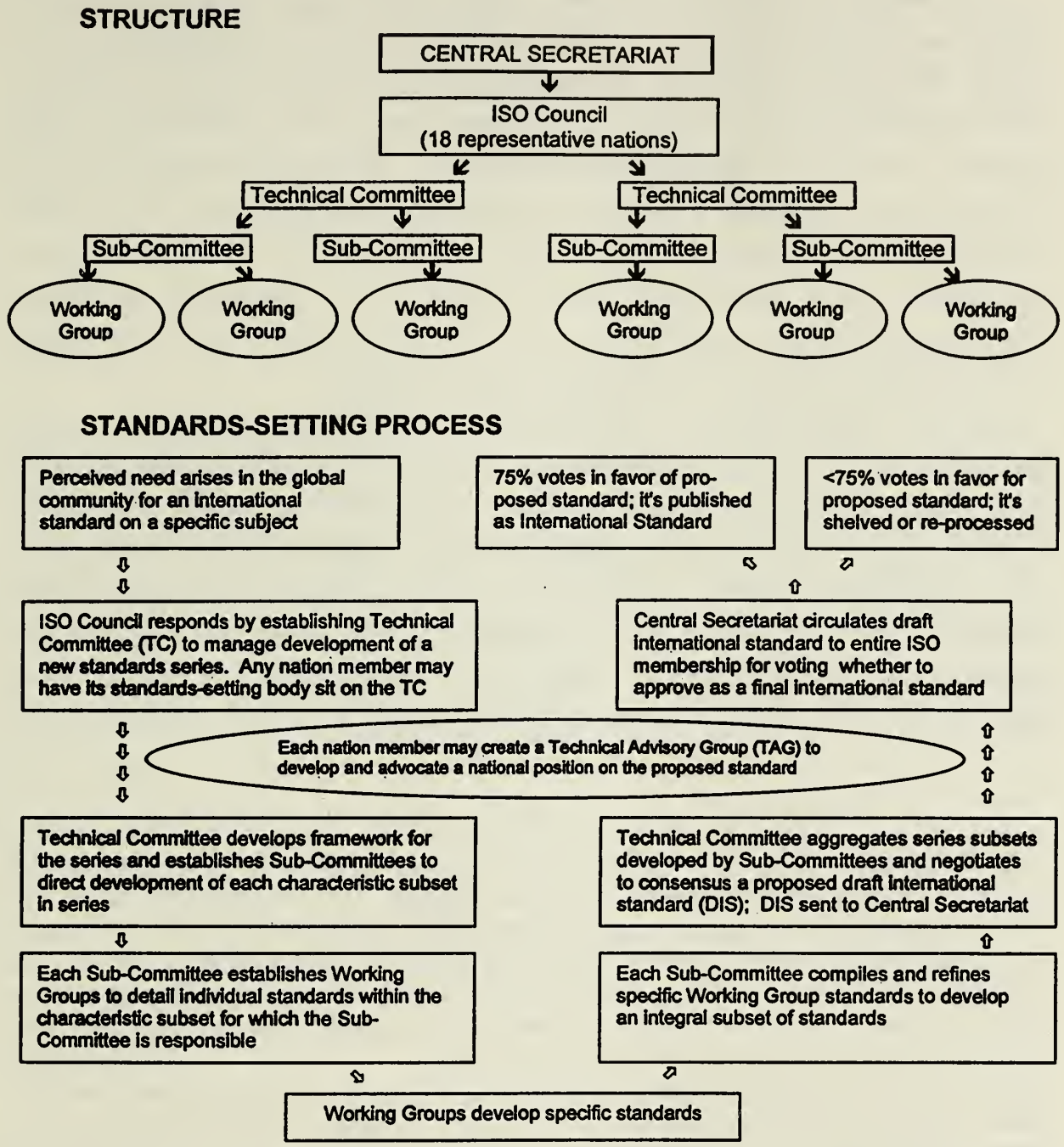
STRUCTURE
CENTRAL SECRETARIAT
ISO Council
(18 representative nations)
Technical Committee
Technical Committee
Sub-Committee
Sub-Committee
Sub-Committee
Sub-Committee
Working Group
Working Group
Working Group
Working Group
Working Group
Working Group
STANDARDS-SETTING PROCESS
Perceived need arises in the global community for an international standard on a specific subject
75% votes in favor of proposed standard; it's published as International Standard
<75% votes in favor for proposed standard; it's shelved or re-processed
ISO Council responds by establishing Technical Committee (TC) to manage development of a new standards series. Any nation member may have its standards-setting body sit on the TC
Central Secretariat circulates draft international standard to entire ISO membership for voting whether to approve as a final international standard
Each nation member may create a Technical Advisory Group (TAG) to develop and advocate a national position on the proposed standard
Technical Committee develops framework for the series and establishes Sub-Committees to direct development of each characteristic subset in series
Technical Committee aggregates series subsets developed by Sub-Committees and negotiates to consensus a proposed draft international standard (DIS); DIS sent to Central Secretariat
Each Sub-Committee establishes Working Groups to detail individual standards within the characteristic subset for which the Sub-Committee is responsible
Each Sub-Committee compiles and refines specific Working Group standards to develop an integral subset of standards
Working Groups develop specific standards

FIGURE 1: ISO STRUCTURE AND PROCESS [19]

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[19] The information for Figure 1 was derived from a variety of sources. *See generally* International Standards Organization (ISO) ISO 14000 InfoCenter internet site, "www.iso14000.com/"; Roszell Hunter, *Standardization and the Environment*, INT'L ENV'T REP. (BNA) No. 16, at 186 (Mar. 10, 1993); Rodgers, *supra* note 10 at 181; Roht-Arriaza, *supra* note 10, at 479.

Throughout most of ISO's history, the work product has focused on technical and manufacturing standards, primarily in the fields of mechanical and chemical engineering, materials processing, graphics, information processing, and photography.[20] The focus began to shift in the 1980's from product-based standards to systems-based standards, reflecting the general trend in management theory from an emphasis on productivity toward a focus on systems engineering and total quality management (TQM). This shift in ISO emphasis demonstrated that the forty-year inventory of detailed product-based standards may have met a useful limit, and the time had arrived to move to the broader picture.

The International Organization for Standardization published its first set of systems-based standards for management and performance in 1987 as the ISO 9000 series.[21] The ISO 9000 series provided a standardized method for assessing quality management systems in any kind of business.[22] Although the European Community quickly embraced the new management standards, American businesses initially rebuffed the benefits of the series, fearing that it created non-

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[20] Examples of international standards include jewelry ring sizes (ISO 8653:1986) and color film speed for still photography (ISO 5800:1987).

[21] International Standards Organization: ISO 9000 (1987): Quality Management and Quality Assurance Standards—Guidelines for Selection and Use 1.

[22] The ISO 9000 series of standards outline the elements of a quality system that must be in place to satisfy customer requirements: plans, responsibilities, procedures, and resources. The standards require a company to design quality assurance into the process from its inception rather than relying upon the outmoded method of using inspections to find and remove defective products from the manufacturing and marketing process. Each standard in the 9000 series requires documentation of a firm's practices, including its manufacturing process (if a manufacturer), procurement, account management, and system monitoring and auditing practices. Meeting the 9000 standards demonstrates to a customer that the registered manufacturer has a thorough quality control system in place and can maintain the system over a period of time. *See* Suzanne Laplante, *The European Union's General Product Safety Directive: Another Call for U.S. Exporters to Comply With the ISO 9000 Series*, 22 SYRACUSE J. INT'L L. & COM. 155, 167-68 (1996) (noting ISO 9000 "provides globally recognized method for assessing quality control systems"); Hank Barnette, *Meeting Quality Standards: ISO 9000, 9002, 14000, and QS 9000*, NEW STEEL, June 1996, at 112 (predicting ISO registration will become necessary to do business with international companies).

tariff trade barriers. But within a short time, the defensive posture began to buckle under the pressure of market forces.[23] Today, meeting ISO 9000 standards is *de rigeur* for a firm to compete on the vendor level internationally because compliance is indicative of quality management practice and within the electronics industry is the primary benchmark for selecting vendors within the United States.[24]

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[23] A 1992 survey of mid-sized United States firms found 48% of its respondents were unaware of ISO 9000 and "only 11% thought ISO 9000 would affect them a great deal." Matthew Gallagher, *ISO Expands*, CHEM. MKTG. REP., Apr. 10, 1995, at SR 12. Another survey, by the American Electronics Association, found that in the highly competitive electronics industry, 42% of those firms responding used ISO 9000 criteria as a management tool and an additional 28% were applying for ISO 9000 certification. *In This Report*, ADVANCED MANUFACTURING TECH., June 15, 1992, *available in* 1992 WL 2797243.

By 1995, tens of thousands of registrations for ISO 9000 facilities had occurred worldwide. Henry R. Balikov and Patrick O. Cavanaugh, *What We Need to Know About ISO 14000*, 10-SPG NAT. RESOURCES & ENV'T 64, 64 (1996). The standards were recognized as comparable to the European quality assurance standards. Laplante, *supra* note 22, at 169. The ISO 9000 movement had even reached companies in India. *Aggressive Firms in India Can Make Good Business Partners*, MARKET ASIA PAC., Apr. 1, 1995, *available in* 1995 WL 2369526. In addition, federal agencies, including the National Aeronautics and Space Administration, the Food and Drug Administration, and the Department of Defense, had begun to harmonize internal quality requirements with ISO 9000. Charles W. Thurston, *Quality is a Global Affair: Worldwide Adoption of International Organization for Standardization Program, Quality '94,* CHEM. MKTG. REP., Oct. 31, 1994, at SR 10.

As of February, 1997, 12,556 United States firms had registered under ISO 9000, compared with 822 at the end of 1992. Christopher Winans, *Setting the Standard*, BEST'S REVIEW: PROPERTY-CASUALTY INS. EDITION, Apr. 1, 1997, at 32, *available in* 1997 WL 9572696. *See generally* Alex Scott, *Europe Weighs Its Standards Options,* CHEM. WK., Apr. 2, 1997, at 33 (stating ISO 14000 is considered "gold standard" in environmental management, similar to ISO 9000 in quality management); *National Institute of Standards and Technology: Testimony on H.R. 1756 Before the Committee on Science* (1995) (statement of Samuel D. Cheatham, Vice President of Corporate Strategic Initiatives Storage Technology Corporation) (predicting compliance [with ISO 14000] will ultimately become "added cost" of transacting international business as did ISO 9000 standards).

[24] Interview with John H. Evers, D.E., Member Group Technical Staff, Six Sigma Black Belt, Cycle Time Black Belt, Systems Group, Raytheon TI Systems (Oct. 18, 1996).

B. International Standards for the Environment

The ISO 9000 standards prophetically declared that successful companies would make efforts to protect the environment and to perform life-cycle analysis from product design through the end of its useful life.[25] Not surprisingly, the development of environmental standards logically has followed the rapid development pattern of ISO 9000. By the end of 1990, European Community members had already made initial steps toward the development of national environmental management standards.[26] At the same time, the United Kingdom's British Standards Institution was drafting its environmental management standard, BS 7750, and Canada and Japan were developing parallel environmental guidelines. For World Standards Day in October, 1990, the leaders of the International Organization for Standardization and its sister organization, the International Electrotechnical Commission (IEC), agreed that the complementary organizations provided the "best placed international forum" in which to concentrate the energies and talents of scientists, industry executives, and governmental representatives on resolving technical problems affecting the environment.[27] Thus, shortly after the introduc-

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[25] ISO 9004 states that "in order to be successful, a company must offer products or services that . . . comply with statutory (and other) requirements of society." INT'L ORG. FOR STANDARDIZATION, QUALITY MGMT. & QUALITY SYS. ELEMENTS: PART I: GUIDELINES, ISO 9004-1, ART. 0.1 (1994). In describing the requirements of society, ISO 9004 includes "protection of the environment, health, safety, security, conservation of energy and natural resources." *Id.* at ART. 3.3. Lifecycle analysis is required for "all phases in the life cycle of a product and processes, from initial identification of market needs to final satisfaction of requirements." *Id.* at ART. 5.1.1.

[26] Specifically, the EC's voluntary ecomanagement and audit scheme (EMAS) was in progress. The Council of the European Community enacted a regulation that allowed industrial firms to voluntarily participate in the EMAS. Council Regulation 1836/93, art. 1, 1993 O.J. COMM. EUR. (L 168) 1. The Maastricht Treaty of 1992 incorporated the European Community into the more expansive entity known as the European Union. Treaty on European Union and Final Act, Feb. 7, 1992, 31 I.L.M. 247. For European events or laws occurring prior to the Maastricht Treaty, the term "European Community" or "EC" has been used in this article. For reference to activities post-dating the Treaty, the term "European Union" or "EU" has been used.

[27] *21st World Standards Day: Restoring the Environment*, ISO BULL., Oct.

tion of ISO 9000 and the Exxon Valdez disaster, notable movement occurred within standards-setting bodies to respond to environmental management concerns.

In preparation for the Rio Summit and in response to the burgeoning number of regional environmental standards, a 1991 United Nations report on trade and the environment raised an appeal for the rapid development of international environmental standards.[28] In the spring of 1992, ISO and IEC responded to the report by forming the Strategic Advisory Group on the Environment (SAGE) to evaluate the need for international environmental standards.[29] By October, 1992, SAGE reported that a Technical Committee was necessary to develop international standards. In January, 1993, the ISO created Technical Committee 207 (TC 207) to develop the environmental management standards referred to as the ISO 14000 series.[30] Canada received the position of Secretariat for TC 207 and managed the administrative work for the technical committee through the Canadian Standards Association (CSA). TC 207, as reflected in Figure 2, is supported by six subcommittees:

1. Environmental Management Systems (ISO 14001-14004);
2. Environmental Auditing (ISO 14010-14012);
3. Environmental Labeling (ISO 14020-1402X);
4. Environmental Performance Evaluation (14031);
5. Lifecycle Analysis (14040-14043); and,

1990, at 8.

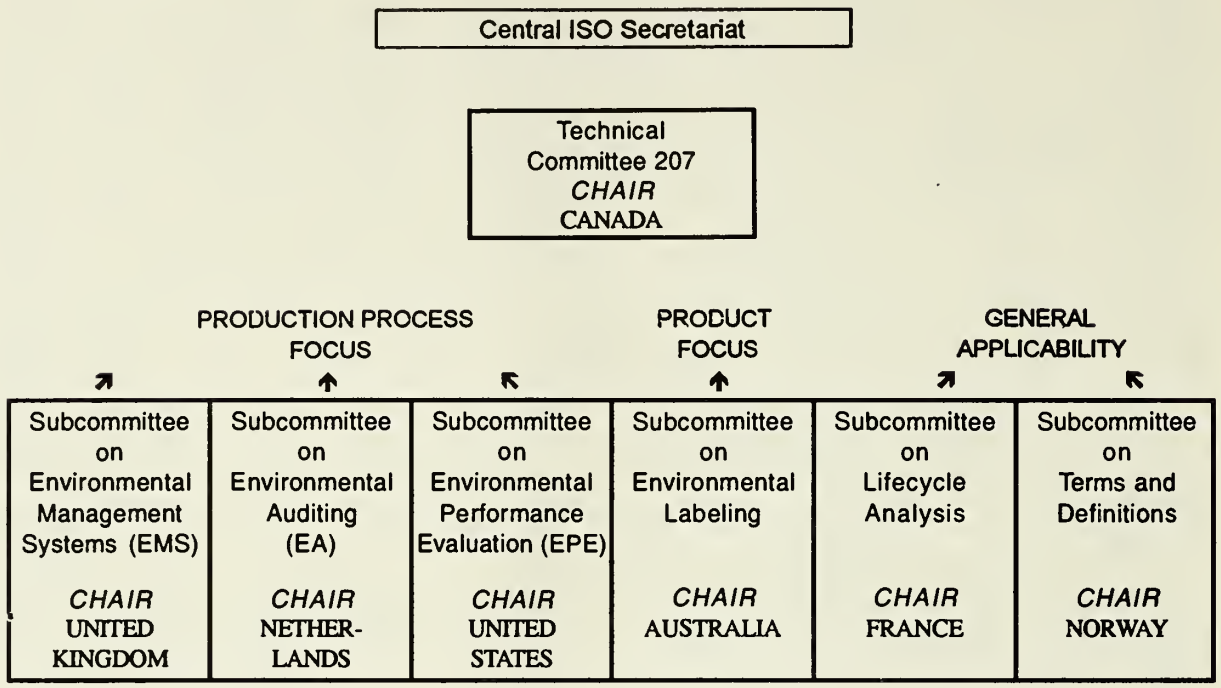
[28] *Subcommittee to the Secretary-General, Report of the Secretary-General of the United Nations Conference on Trade and Development (UNCTAD)*, Preparatory Committee for the United Nations Conference on Environment and Development, Plenary Sess., Agenda Item 2B, at 16, U.N. Doc. A/CONF.151/PC/48 (1991).

[29] INT'L ORG. FOR STANDARDIZATION, ISO/COUNCIL 1992 AGENDA ITEM 6.7, ISO/IEC STRATEGIC ADVISORY GROUP ON ENVIRONMENT (SAGE), ANNEX 1, at 2 (1992).

[30] *See generally* Balikov & Cavanaugh, *supra* note 23; Rodgers, *supra* note 10; *FOCUS* REPORT: *Developing International Environmental Management Standards: Why Companies Should Get Involved,* BUS. & ENVIRONMENT, Apr., 1, 1993, *available in* 1993 WL 2736218; *Technical Committee Begins Work on International Environmental Management Standards,* BUS. & ENVIRONMENT, July 1, 1993, *available in* 1993 WL 2736167.

6. Terms and Definitions (14050).

FIGURE 2: STRUCTURE FOR DEVELOPMENT OF THE ISO 14000 ENVIRONMENTAL STANDARDS


Central ISO Secretariat
Technical Committee 207 CHAIR CANADA
PRODUCTION PROCESS FOCUS
PRODUCT FOCUS
GENERAL APPLICABILITY
Subcommittee on Environmental Management Systems (EMS) CHAIR UNITED KINGDOM
Subcommittee on Environmental Auditing (EA) CHAIR NETHER-LANDS
Subcommittee on Environmental Performance Evaluation (EPE) CHAIR UNITED STATES
Subcommittee on Environmental Labeling CHAIR AUSTRALIA
Subcommittee on Lifecycle Analysis CHAIR FRANCE
Subcommittee on Terms and Definitions CHAIR NORWAY

In September, 1996, the ISO completed and published the ISO 14001 and 14004 environmental management standards (EMS).[31] Figure 3 charts the entire ISO 14000 series and provides information on the status of each directive.[32] Since ISO 14000 will continue to develop over time, those interested in environmental issues and knowledgeable about ISO 14000 have a unique opportunity to impact the development of environmental standards and the application of those standards within industry.

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[31] INT'L ORG. FOR STANDARDIZATION, INT'L STANDARD: ISO 14000: ENVTL. MGT. SYS.: SPECIFICATION WITH GUIDANCE FOR USE (1996). *See also ISO 14000 Environmental Management Standards Take Final Shape*, CHEM. ENG'G Oct. 1, 1996, at 17, (Gerald Parkinson ed.) *available in* 1996 WL 8601520.

[32] The chart was derived from materials listed *supra* note 30 and INT'L STANDARD 14000, *supra* note 31.

FIGURE 3: THE ISO 14000 SERIES

NUMBER	STATUS	TITLE OF STANDARD OR GUIDELINE
ISO 14001	International Standard **	Environmental Management Systems -- Specifications with Guidance for Use
ISO 14002	Assessment for Need	Environmental Management Systems -- Guidelines on ISO 14001 for Small and Medium Sized Enterprises
ISO 14004	International Standard *	Environmental Management Systems -- General Guidelines on Principles, Systems, and Supporting Techniques
ISO 14010	International Standard **	Guidelines for Environmental Auditing -- General Principles
ISO 14011	International Standard **	Guidelines for Environmental Auditing -- Audit Procedures -- Auditing of Environmental Management Systems
ISO 14012	International Standard **	Guidelines for Environmental Auditing -- Qualification Criteria for Environmental Auditors
ISO 14015	Preliminary Work Item	Environmental Assessments of Sites and Entities
ISO 14020	Draft International Standard	Environmental Labels and Declarations: General Principles
ISO 14021	Draft International Standard	Environmental Labels and Declarations: Self-Declaration Environmental Claims -- Guidelines and Definition and Usage of Terms
ISO 14022	Committee Draft	Environmental Labels and Declarations: Self-Declaration Environmental Claims -- Symbols
ISO 14023	Committee Draft	Environmental Labels and Declarations: Self-Declaration Environmental Claims -- Testing & Verification Methodologies
ISO 14024	Draft International Standard	Environmental Labels and Declarations: Environmental Labeling Type I -- Guiding Principles and Procedures
ISO 14025	Working Draft	Environmental Labels and Declarations: Environmental Labeling Type III -- Guiding Principles and Procedures
ISO 14031	Draft International Standard	Environmental Management: Environmental Performance Evaluation -- Guidelines
ISO 14040	International Standard	Environmental Management: Life Cycle Assessment -- Principles and Framework
ISO 14041	Draft International Standard	Environmental Management: Life Cycle Assessment -- Goal and Scope Definition and Inventory Analysis
ISO 14042	Committee Draft	Environmental Management: Life Cycle Assessment -- Life Cycle Impact Assessment
ISO 14043	Committee Draft	Environmental Management: Life Cycle Assessment -- Life Cycle Interpretation
ISO 14050	Draft International Standard	Environmental Management: Vocabulary
ISO GUIDE 64		Guide for the Inclusion of Environmental Aspects in Product Standards

* Adopted by ANSI as American National Standard
** Adopted by ANSI as American National Standard and by European Union as CEN standard

C. Fundamentals of the ISO 14000 Environmental Management System and Supporting Standards

1. The Environmental Management System

The ISO Environmental Management System (EMS) is the crux of the entire ISO 14000 series. The EMS provides a comprehensive management tool for a company to continuously review, audit, improve, and monitor the firm's compliance with existing international, national, and local environmental legislation. The EMS is designed for all firms, regardless of size or type. To achieve such comprehensive application, the EMS does not require compliance with specific environmental criteria beyond applicable laws and regulations, but provides a process by which a company may evaluate and control the environmental impact of corporate activities. In other words, ISO 14000 does not set specific performance standards for a company to achieve, but "require[s] a company to make performance-related commitments."[33]

Additionally, the system offers a company the ability to go beyond minimum legal requirements and achieve good environmental stewardship, which is a marketing asset. For example, a company could use the EMS to recycle manufacturing waste or beverage containers used by employees, design products that minimize waste by using recyclable packaging, label products to reduce the risk of toxic effects by warnings to consumers of a product's toxic effects or descriptions of proper disposal methods, and develop facilities in an environmentally aware manner by incorporating sensitive wetlands into the overall landscape design rather than filling the land for an additional parking lot.

ISO 14001 establishes the requirements a company must meet in order to obtain certification for the firm's environmental management system. The certification process requires the applicant company to either self-certify compliance with ISO

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[33] Murray, *supra* note 13, at 578; *A New ISO Standard To Deal With—ISO 14000*, ADHESIVES AGE, July 1, 1996, at 38, *available in* 1996 WL 9462938.

14001 or to retain a third-party registrar or auditor to perform an independent audit of the firm's environmental management system.[34] If the audit demonstrates that a firm meets the ISO 14001 requirments, the firm may receive certification. ISO 14004 provides the guidelines for either improving an environmental management system already in place or initiating such a system. The standards define an environmental management system as "that part of the overall management system which includes organizational structure, planning, activities, responsibilities, practices, procedures, processes and resources for developing, implementing, achieving, reviewing, and maintaining the environmental policy."[35] Executive management must commit to corporate governance by a set of six overarching principles:

1. Environmental protection shall be one of the highest corporate priorities with clear assignment of responsibilities and accountabilities to all employees.
2. There shall be compliance with all environmental laws and regulations applicable to the company's activities, products and services.
3. There shall be ongoing communications on environmental commitment and performance with all stakeholders.
4. There shall be strategic planning that sets forth environmental performance objectives and targets, to be implemented through a disciplined management process.
5. There shall be periodic performance measurement of the environmental management system, as well as systems audits and management reviews, to achieve continual improvement wherever possible.
6. There shall be full integration of the environmental

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[34] *See* Murray, *supra* note 13, at 578; Rick Mullin & Kara Sissell, *ISO 14000, Merging Business and Environment*, CHEM. WK., Oct. 9, 1996, at 52; Natalie Schrimpf, *New Standard Sends A Message: ISO 14000 Series Creates Formal Environmental Management Plan*, CRAIN'S DETROIT BUS., May 5, 1997, at 17, *available in* 1997 WL 8575781.

[35] INT'L ORG. FOR STANDARDIZATION, INT'L STANDARD: ISO 14001, <http://web.ansi.org/public/iso14000/docs/14001.html>.

management system with health and safety, quality, finance, business planning and other essential management processes.[36]

To meet the EMS standard, executive management must formulate a policy that reflects the fundamental principles and perform an initial review "to identify the environmental aspects of its activities, products, and services that it can control and over which it can be expected to have an influence."[37] Identification of the environmental aspects of activities includes in-depth review of all applicable environmental regulations and level of compliance. Management must initially and continuously evaluate the organization's activities, products and services to determine the firm's interaction with and impact on the environment. Moreover, the initial review should include a risk assessment to determine environmental liabilities that could result from environmental impacts caused by the firm's activities.[38]

Following the initial review, management must develop a strategic implementation plan using the information obtained in the initial review and based upon the widely recognized elements of project management: define environmental objectives, specify performance targets, designate responsibility for achieving targets, allocate human and capital resources to achieve targets, identify timeframes, monitor the environmental management process periodically, and take corrective or preventative action if there is nonconformance.[39] Objectives

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[36] *Id.*

[37] INT'L ORG. FOR STANDARDIZATION, INT'L STANDARD: ISO 14004: ENVTL. MGT. SYS.: GENERAL GUIDELINES ON PRINCIPLES, SYSTEMS, AND SUPPORTING TECHNIQUES (1996), <http://web.ansi.org/public/iso14000/docs/14004.html>. Section 4.1.3 sets forth the basics of the initial review, and section 4.2 details what is involved in identifying and evaluating an organization's environmental impacts. *Id.*

[38] INT'L STANDARD: ISO 14001, *supra* note 13, at Sec. 4.2. Three questions are posed by the standard that relate to risk assessment of a particular environmental impact: 1) How frequently will the situation arise that could lead to the impact?, 2) What are the significant environmental aspects, considering impacts, likelihood, severity and frequency?, and 3) Are the significant environmental impacts local, regional or global in scope?

[39] An objective is an overall goal, while targets are quantified measurements related to the objective. For example, one objective may be to reduce effluent

and targets must account for regulatory requirements, operational requirements, and the views of interested stakeholders, including the public.[40] Management sets the company's objectives and targets since there are no performance-specific ISO 14000 standards. A company could set meaningless objectives and targets and still meet the requirements of the ISO EMS (14004). Accordingly, the call to interested stakeholders to be involved in the development and implementation of the ISO 14000 series becomes necessary. If a firm implements the ISO EMS in good faith, however, the process should promote improved environmental performance and enhance overall business performance.

2. Environmental Auditing

The ISO 14000 series is a continuous improvement model. Thus, a firm implementing the ISO 14004 EMS must continually review and improve environmental management performance. Therefore, periodic auditing of EMS performance and top management review of results is crucial for pinpointing deficiencies and tracking improvement. The guidelines for the environmental auditing procedures are contained in International Standards 14010-14012.[41] Importantly, internal auditing of an organization's ISO 14004 environmental management system does not replace specific environmental audits required externally by regulators or internally by the firm's environmental engineering personnel, but rather complements the specific purpose audits. The firm should use the environ-

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emissions at plant #1 in 1998. The related target may be to reduce such emissions "by 50% in 1998."

[40] Regulatory requirements include laws, administrative regulations, codes of practice, and other regulatory guidelines. Operational requirements include finance, production, and marketing.

[41] INT'L ORG. FOR STANDARDIZATION, INT'L STANDARD: ISO 14010: GUIDELINES FOR ENVIRONMENTAL AUDITING—GENERAL PRINCIPLES (1996) (herein, ISO 14010); INT'L ORG. FOR STANDARDIZATION, INT'L STANDARD: ISO 14011: GUIDELINES FOR ENVIRONMENTAL AUDITING—AUDIT PROCEDURES (1996) (herein, ISO 14011); INT'L ORG. FOR STANDARDIZATION, INT'L STANDARD: ISO 14012: GUIDELINES FOR ENVIRONMENTAL AUDITING—QUALIFICATION CRITERIA FOR ENVIRONMENTAL AUDITORS (1996) (herein, ISO 14012).

mental management audit to determine whether the system continues to meet the ISO 14004 requirements. Management must on a routine basis review and evaluate audit results, new and proposed legislation, monitoring information, complaints, stakeholder input, and corrective action taken in response to shortcomings. Routine review ensures the system's effectiveness by allowing executive management the opportunity to improve the system by responding to deficiencies.

Environmental groups, government agencies, and persons affected individually by a company's activities are interested stakeholders as contemplated by the ISO 14000 standards.[42] Stakeholders have the opportunity to provide input to firms during the auditing process because the firm is directed by the ISO process to review and respond to stakeholder comments and complaints about the firm's environmental performance. However, the audit procedure occurs internally without a regulatory requirement for public disclosure or public comment period, raising reasonable concerns about the value of the ISO directive for stakeholder involvement in the EMS process. Progressive firms will take the directive seriously by considering and responding to stakeholder comments and urging cooperative problem solving with stakeholders. This will maximize internal commitments to EMS, improve relations with consumers and stakeholders, and reduce the risk of regulatory action or citizen suits.

3. Labeling Standards

The international environmental standards related to labeling set forth in ISO 14020-14025 are known as "eco-labels" and are in the draft stages of development.[43] The label-

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[42] INT'L ORG. FOR STANDARDIZATION, INT'L STANDARD: ISO 14004, <http://web.ansi.org/public/iso14000/docs/14004.html>.

[43] INTERNATIONAL STANDARDS ORGANIZATION: DRAFT INTERNATIONAL STANDARD 14020 (1996)—ENVIRONMENTAL LABELS AND DECLARATIONS—GENERAL PRINCIPLES (herein, DIS/ISO 14020); DRAFT INTERNATIONAL STANDARD ISO 14021 (1996)—ENVIRONMENTAL LABELS AND DECLARATIONS—SELF-DECLARATION ENVIRONMENTAL CLAIMS—GUIDELINES AND DEFINITION AND USAGE OF TERMS (herein, DIS/ISO 14021); COMMITTEE DRAFT ISO 14022 (1996)—ENVIRONMENTAL LABELS

ing sub-committee divided eco-labels into three groups.[44] Type I labels (DIS/ISO 14024) refer to third-party certification programs, known as practitioner programs, that award labels to products meeting criteria related to a product's overall environmental impact.[45] The DIS/ISO 14024 standard sets forth criteria for awarding labels that represent to consumers excellence in environmental management or low environmental impact.

Type II labels refer to self-declaration claims.[46] Companies that wish to assert environmental claims about products may use the ISO standards for self-declaration without the endorsement label of a third-party certification organization. These are generally set forth in DIS/ISO 14021 through CD/ISO 14023. The purpose of Type II labels is to standardize terms and definitions used to make declarations about environmental impact. For example, the term "compostable" will have one definition and a product not meeting that definition will not be able to self-declare that the product is compostable.

Type III labels (WD/ISO 14025) delineate quantified product information (QPI) that provide the consumer with information about certain environmental concerns, such as toxic emis-

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AND DECLARATIONS—SELF-DECLARATION ENVIRONMENTAL CLAIMS—SYMBOLS (herein, CD/ISO 14022); COMMITTEE DRAFT ISO 14023 (1996)—ENVIRONMENTAL LABELS AND DECLARATIONS—SELF-DECLARATION ENVIRONMENTAL CLAIMS—TESTING AND VERIFICATION METHODOLOGIES (herein, CD/ISO 14022); DRAFT INTERNATIONAL STANDARD ISO 14024 (1996)—ENVIRONMENTAL LABELS AND DECLARATIONS—ENVIRONMENTAL LABELING TYPE I—GUIDING PRINCIPLES AND PROCEDURES (HEREIN DIS/ISO 14024); AND WORKING DRAFT ISO 14025 (1996)—ENVIRONMENTAL LABELS AND DECLARATIONS—ENVIRONMENTAL LABELING TYPE III—GUIDING PRINCIPLES AND PROCEDURES (herein, WD/ISO 14025).

[44] INT'L ORG. FOR STANDARDIZATION, ISO/TC 207 (SC3 WG3 N15): *Principles of All Environmental Labeling* (June 1995) <http://web.ansi.org/public/iso14000/docs/207_om.ntml>; W. LEE KUHRE, ISO 14020's: ENVIRONMENTAL LABELING-MARKETING: EFFICIENT AND ACCURATE ENVIRONMENTAL MARKETING PROCEDURES (1997). *See also* Roht-Arriaza, *supra* note 10, at 512.

[45] INT'L ORG. FOR STANDARDIZATION, DIS/ISO 14024; KUHRE, *supra* note 44, at 45. A well-known example of a practitioner program label is the "UL" symbol awarded by Underwriter Laboratories to products that pass the program's performance criteria.

[46] INT'L ORG. FOR STANDARDIZATION, DIS/ISO 14021, CD/ISO 14022, and CD/ISO 14023; KUHRE, *supra* note 44, at 15.

sions, energy use, or use of energy or material resources during manufacturing.[47] A product bearing a Type III label will allow a consumer to compare the environmental attributes of one product with another.

Globally, more than three dozen eco-label programs exist.[48] The ISO eco-label standards, expected to lend significant credibility to the eco-label concept, are not intended to merge the various eco-label programs into one universal label. Although the eco-label subcommittee will consider guidelines for harmonizing the various programs, the primary effort will be to define terms relevant to the process of labeling, such as defining specific terms (e.g., "non-toxic") or outlining testing and verification methodologies for specific environmental claims (e.g., "biodegradable"). The eco-label subcommittee faces a daunting task that is crucial to the adoption and effectiveness of the ISO 14000 series. If consumer awareness animates the consumer market, the implications of standard labels are considerable.[49]

4. Life Cycle Assessment Standards

Traditionally, manufacturers designed a product for sale to the consumer without consideration of after-market impacts other than product liability. Current management theory in-

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[47] INT'L ORG. FOR STANDARDIZATION, WD/ISO 14025; KUHRE, *supra* note 44, at 47.

[48] Examples of eco-labels include, but are not limited to: Germany's "Blue Angel" eco-label, the Japanese Environment Agency's "Eco-Mark," Singapore's Green Labeling Scheme, the Netherlands' eco-labels for oil tankers and timber companies, various programs among EU member nations, and several United States programs, such as Green Seal, Smart Wood, Scientific Certification Systems (focusing on home improvement and gardening products), and the HVS Eco Services "Ecotel" award specific to the lodging industry. KUHRE, *supra* note 44 at 123; *Ecolabel Update: Move Toward Harmonization Continues as Individual Programs Grow*, BUS. & ENVIRONMENT, Jan. 1, 1995, *available in* 1995 WL 8380317.

[49] Before purchasing paper goods offered for sale by different vendors and marketing the goods as green or environmentally sound, a grocer might compare Type III labels quantifying toxic emissions that occurred during manufacture. An individual consumer may decide to purchase a new appliance or car based upon environmental impact (Type I), recyclability (Type II), or fuel consumption (Type III). See KUHRE, *supra* note 44, at 6.

structs that manufacturers recognize and respond to environmental impact throughout the entire product life cycle from initial design through disposal of the product.[50] Life cycle assessment (LCA)—or "cradle to grave" analysis—was a growing movement before the ISO 14000 process began and recognition of LCA's relevance to environmental performance is on the rise.[51]

The standards for life cycle assessment, currently in the draft stages of development, are set forth in ISO 14040-14043.[52] Life cycle assessment is defined as the evaluation of the burdens upon the environment associated with a product from the purchase of component materials through disposal of the product at the end of its useful life.[53] This type of assessment recognizes that a product may impact the environment in each stage of a product's useful life from production and marketing through consumption and disposal. The draft ISO life cycle assessment standards outline the scope of the analy-

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[50] This life cycle includes resource use, wastestream, and field maintenance. Sorkis & Rasheed, *supra* note 3, at 17.

[51] *Lifecycle Assessment Update: Progress on ISO Standards*, BUS. & ENVIRONMENT, Dec. 1, 1994, *available in* 1994 WL 2505086.

[52] INTERNATIONAL STANDARDS ORGANIZATION: FINAL DRAFT INTERNATIONAL STANDARD ISO 14040 (1996)—ENVIRONMENTAL MANAGEMENT—LIFE CYCLE ASSESSMENT—PRINCIPLES AND FRAMEWORK (herein, FDIS/ISO 14040); DRAFT INTERNATIONAL STANDARD ISO 14041 (1996)—ENVIRONMENTAL MANAGEMENT—LIFE CYCLE ASSESSMENT—GOAL AND SCOPE DEFINITION AND INVENTORY ANALYSIS (herein, DIS/ISO 14041); COMMITTEE DRAFT ISO 14042 (1996)—ENVIRONMENTAL MANAGEMENT—LIFE CYCLE ASSESSMENT—LIFE CYCLE IMPACT ASSESSMENT (herein, CD/ISO 14042); COMMITTEE DRAFT ISO 14043 (1996)—ENVIRONMENTAL MANAGEMENT—LIFE CYCLE ASSESSMENT—LIFE CYCLE INTERPRETATION (herein, CD/ISO 14043).

[53] Life cycle assessment was a frequent topic for discussion as early as 1990 when the German government proposed the first product "take-back" law. Take-back laws grant customers the right to return a product to the manufacturer at the end of the product's life and prohibit manufacturers from disposing of the spent product. Most of the early literature focused on reuse and recycling rather than designing the product to reduce environmental impacts. LCA is also referred to as cradle to grave analysis, eco-balance, environmentally conscious manufacturing, or product stewardship. *See generally* Stuart L. Hart, *A Natural Resource Based View of the Firm*, ACAD. MGMT. REV., Oct. 1, 1995, at 986; Hunt and Auster, *Proactive Environmental Management: Avoiding the Toxic Trap*, 31 SLOAN MGMT. REV. 7-18 (1990); Kleiner, *supra* note 3, at 38-47; Sorkis & Rasheed, *supra* note 3, at 17.

sis, but do not delineate the object or methods of analysis.[54] The fundamental steps of life cycle assessment include: goal definition and scoping, inventory analysis, impact assessment and valuation, and improvement assessment.

The first step, goal definition and scoping, requires a company to identify the purpose of the study, determine the functional unit (i.e., one washing machine or the amount of paint required to cover a washing machine), and define system boundaries and components. In the scoping process, for example, a paint manufacturer might choose a one pint container as the functional unit for analyzing the life cycle of white latex paint.

The second step, inventory analysis, requires the company to delineate materials and energy flows, collect data, and quantify resource consumption and releases to the environment. The purpose of inventory analysis is to calculate the environmental burden at each stage of the product life cycle. A paint manufacturer would create a material flow sheet to illustrate the stages of the life cycle of one pint of paint from resource input through disposal. Resource inputs include the materials to manufacture the metal can, the wood pulp and printing inks used to produce the paper label, and the paint ingredients. These inputs become outputs at the end of the cycle and are releases to the environment. The inventory stage of a life cycle assessment quantifies consumption of resources and releases to the environment. An example of resource consumption is the mining for minerals to manufacture the paint, while the use of the paint on outdoor furniture exemplifies a release to the environment. Obtaining reliable data concerning resource consumption and releases to the environment, while being the most troublesome aspect of inventory analysis, remains the key to achieving value from life cycle assessment.[55]

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[54] The information in this subsection was derived from a variety of sources, including: Setac, *Guidelines for Life Cycle Assessment: A Code of Practice*, SOC'Y FOR ENVTL. TOXICOLOGY AND CHEMISTRY, Brussels (1993); R.J. Ollerenshaw, *Life Cycle Analysis: A Route to Sustainable Development?*, POLYMERS PAINT COLOUR J., May, 1, 1996, at 28, *available in* 1996 WL 11525746.

[55] Various organizations and governmental regulatory lists provide the data-

The third step, impact assessment and valuation, requires a firm to classify, rank, and compare the inventory data into environmental consequence categories (i.e., toxicity, resource consumption, air pollution). In this phase of life cycle assessment, a paint manufacturer might classify the inventory data into categories such as toxicity or water pollution. Following classification, the manufacturer could compare the product's environmental impact with industry information, such as the EPA's Toxic Release Inventory. If the manufacturer finds that the product releases an excessive amount of toxins to the environment in comparison to similar products, the manufacturer may redesign the product to contain fewer toxic chemicals or replace toxic chemicals with non-toxic ingredients.

The final phase of life cycle assessment is improvement assessment. Improvement assessment refers to the tasks of detecting opportunities for improvement in resource use, mitigating environmental impacts, and creating a responsive action plan.[56] These tasks are characteristic of the ISO EMS continuous improvement model.

III. Advantages and Disadvantages of ISO 14000

A. Advantages to Firms

The global marketplace is a tough field in which to play. Most business analysts recognize that meeting the minimum requirements set forth in national legislation is not enough to compete successfully in the global marketplace. To gain market advantage, management should seek to meet the needs of the consumer in terms of cost, service time, and product attributes.[57] A firm that meets the consumer's price, makes the

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base to assist in the inventory analysis process, such as the compilation of validated data for LCA's published by the Society for Promotion of Life Cycle Development (SPOLD) and the United States EPA Toxic Release Inventory. Ollerenshaw, *supra* note 54, at 28. *See also* Hemming, *Directory of Life Cycle Inventory Data Sources*, SPOLD, (Nov. 1995); *The LCA Source Book*, SPOLD, (Sustainability Ltd., London, 1993).

[56] Ollerenshaw, *supra* note 54, at 28.

[57] Interview with John H. Evers, D.E., Member Group Technical Staff, Six Sigma Black Belt, Cycle Time Black Belt, Systems Group, Raytheon (Oct. 18,

product available when and where the consumer needs it, and delivers a product demonstrating attributes that match consumer priorities, carries a significant market advantage over a firm that cannot meet these needs. Increasingly, concern for the environment has become a fundamental consumer issue related to product attributes.[58] Consumer concern for the environment can drive demand for increased governmental regulations and for "green" products and services that have a zero or minimal impact on the environment.

Two interrelated advantages should accrue to an organization when the ISO 14000 environmental management system is implemented: (1) competitive advantage and (2) better environmental stewardship. Competitive advantage results from meeting consumer demands, compliance with increasingly complicated regulation, and cost savings related to organizational efficiency and risk reduction. The potential benefits that may be realized from market opportunities for complying companies are also significant with regard to benchmarking.[59] Companies that surpass competitors by meeting the international environmental standards will benefit as customers become more demanding of environmental

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1996).

[58] A 1995 survey conducted by Environmental Research Associates asked 1,000 adults how often they looked to see if the product carried a green label before purchasing. Of the 496 adults who answered (a significant response rate for surveys), only 13% answered they always checked; 28% usually check; 26% check "once in a while;" 16% rarely check; and 17% said they never check. Researchers also found that soaps/detergents and paper products were the items most often purchased because of an environmental message or symbol on the package or label. *Ecolabel Update: Move Toward Harmonization Continues as Individual Programs Grow*, *supra* note 48.

[59] Benchmarking refers to the comparison of one organization against others, especially those believed to be operating at the top. Benchmarking is used for two purposes: first, the organization can compare itself with those whose performance it desires to emulate; second, benchmarking allows the organization to take advantage of the experience of the best performers, whether the performance is in process or managerial practices. Applied Chemicals (Australia), for example, regards their ISO EMS system as a means of setting benchmarks on the company's products that may be assessed and evaluated by any customer. Kara Sissell, *Case Studies: Around the World With ISO 14000*, CHEM. WK., Sept. 25, 1996, at 54, 56.

stewardship. Better environmental stewardship may seem purely philanthropic, but when consumers and regulatory agencies demand good stewardship, philanthropy has financial rewards.

ISO 14000 is based upon ISO 9000 and seems to be developing within the industry in a similar pattern to the quality standard.[60] Therefore, industry success with ISO 9000 implementation may augur benefits that could accrue to ISO 14000 implementation. A 1996 survey reported that about 95% of companies registered to ISO 9000 reap internal benefits and 85% demonstrate external savings.[61] A 1997 survey of ISO 9000-certified companies reported that 31% of the respondents plan to seek ISO 14000 certification.[62]

The experience of Rockwell Automation, the multinational electronics manufacturer, bears witness to the benefits of improved operational efficiency resulting from ISO 14000 implementation.[63] Rockwell Automation's manufacturing facility in Twinsburg, Ohio, already had an environmental management system in place when it moved to become one of the nation's first registrants to ISO 14001. A five-person team modified the existing systems at a cost of about $100 per hour plus training and registrar expenses. Less than a year after certification to ISO 14001, the facility demonstrated continuing reductions in energy consumption and waste production, and the recycling program reduced material sent to landfills by approximately 150,000 pounds. Rockwell Automation's

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[60] *See supra* note 22 and accompanying text. Since the ISO management standards are intended to work as an integrated system, the terms ISO 14000 and ISO 9000 may be used herein to indicate specific aspects of each series or each series as an integrated unit.

[61] The Quality Systems Update and Dun & Bradstreet Information Services survey reported that external benefits include higher perceived quality, competitive advantage, improved customer demand, and increased market share. Internal benefits include better documentation, greater quality awareness by employees, enhanced internal communications, and increased operational efficiency. *Survey Rates ISO 9000 Success*, CHEM. WK., Apr. 3, 1996, at 29. *See also* Kara Sissell, *Acceptance Varies Worldwide*, CHEM. WK., Sept. 25, 1996, at 53; Winans, *supra* note 23, at 32.

[62] Winans, *supra* note 23, at 32.

[63] Schrimpf, *supra* note 34, at 17.

experience is illustrative of other case studies in which companies certified to BS 7750, EMAS, or ISO 14000 reported that cost benefits do indeed result in waste reduction, improved resource utilization, and risk reduction for regulatory violations.[64] Improved cost control and savings add up to a more efficient organization, providing the implementing company with the ultimate benefit of competitive advantage.

In addition to competitive advantage resulting from more efficient operations and increased customer demand, competitive advantage may derive from better access to financial markets. Corporate analysts place substantial import on "soft drivers" such as strategic vision, employee satisfaction, customer service and satisfaction, product line, and management fitness.[65] Wall Street analysts still focus on yield improvement, financial ratios, sales growth, and cost management as primary indicators of corporate health, but they are increasingly aware of environmental management strategies that drop dollars to the bottom line.

Many interested parties examine a company's environmental performance.[66] As a general rule, the United States Securities & Exchange Commission requires public companies to disclose "material" facts, including environmental liabilities and compliance.[67] Proactive environmental management al-

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[64] *See generally* Glenn C. Hourahan, *ISO 14001: More Pros Than Cons*, APPLIANCE MFR., Aug. 1, 1996, at 72, *available in* 1996 WL 9743936; *Moving Beyond In-Plant Audits*, COATINGS, Sept. 19, 1996, at 91, *available in* 1996 WL 9569163; Mullin & Sissell, *supra* note 34, at 52; Schrimpf, *supra* note 34, at 17; Marjorie Sorge, *Developing Nations Clean Up*, AUTOMOTIVE IND., May 1, 1997, at 52, *available in* WL 1997 WL 9495846.

[65] Mullin & Sissell, *supra* note 34, at 52.

[66] These parties include lending institutions, the risk management industry, capital markets, regulators, courts, and customers. Schrimpf, *supra* note 34, at 17; P.E.J. Green & G. LaFontaine, *Creating an Effective Environmental Management System*, PULP & PAPER CAN., Sept. 1, 1996, at 42, *available in* 1996 WL 9418569; G. Sam Samdani et al., *ISO 14000: New Passport to World Markets*, CHEM. ENG'G, June 1, 1995, at 41, *available in* 1995 WL 7912446.

[67] Rule 10b-5 of the Securities Exchange Act of 1934 imposes liability on persons who make false statements or omit material facts in connection with the offer, purchase, or sale of securities. Stephen L. Kass and Jean M. McCarroll, *Environmental Disclosure in Securities and Exchange Commission Filings*, ENV'T,

lows the firm better control over environmental activities, creating a risk management perspective that the insurance industry appreciates and may reward with reduced premiums.[68] A credit review examines key environmental factors such as liability exposure, permits, regulatory compliance, production efficiency, and whether an environmental management system is operating.[69] Sound environmental management practices are expected to reduce the risk of litigation, but if litigation is necessary, ISO 14004 may be used as a standard of reasonable care or evidence of commercial practice.[70]

The second primary benefit that should accrue to a company pursuing the ISO 14000 regimen is good environmental stewardship in the form of a contribution to the common good of environmental protection. Corporate environmental responsibility demonstratively drops benefits to the bottom line in terms of goodwill, improved corporate image, and public relations.[71]

The ISO 14000 environmental standards are different from the ISO 9000 quality standards in one important aspect—ISO 14000 implementation depends upon regulatory compliance with all applicable environmental laws whereas the ISO 9000 standards do not have a regulatory compliance component.[72] Some industry representatives believe that im-

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Apr. 1, 1997, at 4, *available in* 1997 WL 10045061. Regulations S-K and S-B under the Securities Act of 1933 and the 1934 act require disclosure of specific kinds of information, including capital expenditures on environmental compliance, pending or threatened environmental litigation, and the effect environmental litigation and compliance costs have had on the firm. *Id.*

[68] Judy Greenwald, *Partnership Seeks to Link Profits, Pollution Prevention: Projects Aim to See if Environmental Management Systems Offer Financial Benefits*, BUS. INS., June 9, 1997, at 22, *available in* 1997 WL 8294823; Winans, *supra* note 23, at 32.

[69] Mullin & Sissell, *supra* note 34, at 53.

[70] Greenwald, *supra* note 68, at 22; Schrimpf, *supra* note 34, at 17; *ISO 14000 Hailed as Savior, Questioned as Problematical, in Congressional Review*, PESTICIDE & TOXIC CHEM. NEWS, June 19, 1996, *available in* 1996 WL 8852556.

[71] Schrimpf, *supra* note 34, at 17.

[72] As a result of the significant regulatory requirements, the method for registering under ISO 14000 is different from the ISO 9000 process. Firms desiring to

plementing ISO 14000 will spare the company from the scrutiny of regulatory agencies and reduce the number and intensity of regulatory inspections.[73] Unfortunately, these representatives fail to recognize that a key benefit of ISO EMS implementation is the ability to improve regulatory compliance rather than avoid scrutiny. In order to convert members of industry trying to avoid or reduce the level of regulatory authority by installing a weak EMS, environmental groups and perceptive firms must advocate the benefits that will accrue to firms implementing the international environmental standards. Environmental groups should also adamantly resist any attempt to reduce or eliminate the command and control regulatory structure until it is demonstrated that industry no longer needs a strong command and control structure to operate in an environmentally sound manner.

B. Advantages to the Environment

Any reduction in environmental pollution achieved by industrial organizations that implement the ISO 14000 standards results in a benefit to the environment and a step towards sustainable development. For example, efforts by a company to seize control of waste streams after performing an environmental audit, or design products from cradle to grave utilizing resources that have minimum environmental impacts, constitute improvement in management practices that benefit the environment. But how does an environmental management system drive a business to become "green"?

Case studies of companies meeting the ISO EMS shed light on this question.[74] The specialty chemical manufacturer, Thomas Swan, registered to BS 7750 and amended the envi-

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certify to ISO 14000 must retain a third-party registrar to conduct an independent audit and will need special teams equally skilled in regulatory issues as well as technical process knowledge. See Mullin & Sissell, *supra* note 34, at 53.

[73] *See* Ronald Begley, *Is ISO Worth It?*, J. BUS. STRATEGY, Sept. 1, 1996, *available in* 1996 WL 10928574; *States, Industry Weigh In on Regulatory Relief*, CHEM. WK., Oct. 9, 1996, at 52.

[74] The two firms discussed in the text are representative of firms implementing the ISO EMS. *See* Sissell, *supra* note 59, at 56.

ronmental management system to comply with the ISO EMS.[75] To evaluate environmental impacts at Thomas Swan, management divided each site or facility into various areas ranging from small chemical production units to large greenfield and wooded areas. Management noted the potential environmental effects in each area, then evaluated each effect for significance using an occurrence-detection-consequence system, and gave a score for both normal and emergency conditions. After determining the environmental effects, management set targets for individual projects and outlined broader objectives for improving environmental performance. Targets and broader objectives, along with routine monitoring and audits, allow a firm to pinpoint areas of operation that need attention to improve environmental performance. Thomas Swan's management now believes the firm is more in control of its waste stream and more responsive to the physical environment in which it operates because the firm implemented an environmental management system.[76]

Applied Chemicals, a Melbourne-based Australian firm, is another example of how the environmental management system helps to "green" a company. As part of the company's ISO environmental management system, Applied Chemicals introduced a unique environmental rating system for each raw material used in production and for each product manufactured.[77] The rating system evaluates each product's impact on the environment in the marketplace in relation to occupational health and safety, and to resource use factors. The firm regards the EMS as a tool for continuous improvement in environmental performance, witnessed by the firm's objective to improve the environmental rating of 20% of Applied Chemicals' products per annum.[78] The Thomas Swan and Applied Chemicals case studies suggest that these firms are more "green" because of the ISO EMS. The experience of these

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[75] *See* Sissell, *supra* note 59, at 54.
[76] *Id.*
[77] *Id.* at 56.
[78] *Id.*

firms is typical of firms utilizing an environmental management system.[79] Firms implementing an environmental management system become more "green" through improved pollution prevention, waste stream and emissions reduction, community involvement, regulatory compliance, and commitment to improvement in environmental performance.

Regulatory compliance is the minimum standard that the company must use to set the firm's environmental goals and targets. This requirement particularly benefits the environment if the firm has never examined the level of compliance with environmental regulations, which is not an unlikely prospect given the vast number of firms too small to encounter regulatory scrutiny. Environmental groups could take advantage of the EMS requirement by demanding that large corporations go above and beyond the minimum and by urging small firms to employ the ISO EMS.

C. Potential Disadvantages to the Environment

To those persons and governments interested in protecting the environment, the primary disadvantage of ISO 14000 is that the international environmental standards do not guarantee good environmental stewardship.[80] First, the standards-setting process is suspect because of the lack of input from environmental interests.[81] Second, the standards only prescribe that a company acting in good faith strive to comply with regulatory requirements and achieve the firm's own objectives and targets; the standards do not set performance

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[79] *See* Joe Cascio, *Acceptance of ISO 14000 in the USA*, SB79 A.L.I.-A.B.A., 288 (1997); *ISO 14000: Meeting the Standard*, CHILTON'S FOOD ENG'G, Apr. 1, 1997, at 23; *Neste's New Targets*, CHEM. WK., Oct. 16, 1996, at 50; Kara Sissell, *ISO 14000 Looking for Business Value*, CHEM. WK., Apr. 2, 1997, at 29.

[80] Nicholas A. Robinson, *The Transnational Practice of Environmental Law: Global Access and Due Diligence*, SB52 A.L.I.-A.B.A. 123, 140 (1997). The European Environmental Bureau, a public interest non-governmental organization, voiced a scathing criticism of the ISO EMS. The report is appended to Robinson's article.

[81] *See infra* notes 114-139 and accompanying text.

levels.[82] The standards are procedural rather than substantive. This creates an anomaly unique to the international environmental standards: a company subject to a governmental regulatory scheme with high environmental standards must begin from a higher standard of environmental performance; on the other hand, a company in a nation without a comprehensive environmental regulatory scheme or lower standards may be in compliance with ISO 14001, yet achieve a much lower standard of environmental performance or impact the environment negatively.

Third, the value of the EMS certification process is suspect to critics.[83] Specifically, the international environmental standard is less stringent than the EMAS or BS 7750. Until stakeholders interested in environmental protection are comfortable with the ISO 14000 track record and trust that participants in the ISO 14000 processes (i.e., firms, certification organizations, governing bodies) demonstrate a commitment to good environmental stewardship, industry monitoring and citizen suits to compel regulatory compliance will continue to be necessary.

D. Potential Disadvantages to Industry

1. Public Disclosure

Many United States corporations contend that the public disclosure required by ISO 14000 is intrusive, burdensome, and requires disclosure of confidential business information that may lead to the imposition of fines or litigation.[84] The criticism is due to the recommended disclosures and consideration of concerns held by interested stakeholders outside the

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[82] Murray, *supra* note 13, at 579-80.

[83] *See infra* notes 140-50 and accompanying text.

[84] Such arguments diminish in light of the compromise of the more stringent EU EMAS and BS 7750 standards that occurred during development of the ISO 14000 series. *See generally* Peter Fairley, *Pollution Prevention: 33/50 Celebration Spotlights Waste Reduction, ISO 14000*, CHEM. WK., Sept. 18, 1996, at 17; *ISO 14000 Poses A Challenge*, *supra* note 17, at 14; Murray, *supra* note 13, at 579-80; Robinson, *supra* note 13, at 123.

firm, and to the fact that the United States Environmental Protection Agency (EPA) so far has refused to provide organizations with an evidentiary privilege or any form of shield from public disclosure.[85] The protective corporate laws in the American legal system may predispose such criticism by industry members, but market forces in international business may change this negative attitude toward disclosure. Changing this outdated opposition to public disclosure has been and should continue to be the focus of efforts by environmental groups and socially responsible firms. Fortunately, progressive businesses and regulators recognize that public disclosure is not an unreasonable burden.[86]

2. *Cost of Implementation*

Although case studies demonstrate that implementing ISO 14000 results in operational cost benefits or reductions, there is a cost associated with developing and implementing the environmental management system. Analysts estimate that the cost of implementing ISO 14000 will be similar to the costs demonstratively associated with implementing ISO 9000, which ranged from $100,000-$200,000 per facility.[87] Internal costs for staffing and supporting an environmental management system comprise the bulk of that figure, while external costs, such as consulting fees and the amount paid to the registrar for certification, will probably range from $7,000 to $25,000.[88] The cost of implementing ISO 14000 may be less if

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[85] Incentives For Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, Final Policy Statement, 60 Fed. Reg. 66706, 66710 (Dec. 22, 1995).

[86] Ciba senior vice-president, Joseph Sullivan, urged that the chemical industry "has to be prepared to be open about what we do within the plant." Fairley, *supra* note 84, at 17.

[87] Costs of registering to ISO 9000 averaged close to $200,000, although the cost of implementing the quality standards seems to be decreasing. *Survey Rates ISO 9000 Success*, CHEM. WK., Apr. 3, 1996, at 33. Formosa Plastics estimated that ISO 14000 certification would cost $100,000-$200,000 per facility. Sissell, *supra* note 59, at 56. *See also* Schrimpf, *supra* note 34, at 17.

[88] Mullin & Sissell, *supra* note 34, at 53, in an interview with Bruce Prince, manager, environmental management systems with SGS International Certification Services (New Jersey).

the company was already in compliance with the ISO 9000 quality standard.[89] Companies without a quality management system in place may find implementing the ISO EMS time consuming and difficult in the initial stages, driving up implementation costs and lengthening the time to implement the system.[90] However, if a company has a quality management system in place upon which to build the environmental management system, ISO 14000 certification could take less than nine months.[91]

E. Industry Acceptance of ISO 14000

Acceptance of the ISO 14000 standards varies across the globe, from the series as an absolute requirement for doing business internationally to a fruitless fad.[92] Firms in Japan, Korea, the United Kingdom, and Europe have demonstrated significant interest in ISO 14000. As of spring 1998, 620 ISO 14001 certifications had been awarded to organizations in Japan.[93] Evidently, these certifications are only the tip of the iceberg. A survey by the Japan Environment Agency indicated that more than 60% of the companies surveyed declared an interest in utilizing the environmental standards.[94] A total of 101 Korean firms had received ISO 14000 certification by February 1997.[95]

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[89] Schrimpf, *supra* note 34, at 17; Sissell, *supra* note 59, at 56.

[90] Sissell, *supra* note 59, at 56.

[91] Quality Chemical (Pennsylvania) obtained ISO 14000 certification in less than nine months, but only met the ISO 9000 standard after a two-year process. Quality Chemical instituted an incentive plan for employees, funded by savings from improvements in environmental and quality standards performance. *Id.*; *see also Rockwell Automation Aims to Certify all 64 Facilities*, INDUS. WK. 44, Feb. 16, 1998, *available in* 1998 WL 10169533 (reporting Rockwell Automation's Twinsburg implementation in only four weeks).

[92] Cascio, *supra* note 79, at 289-90; Sissell, *supra* note 79, at 29; *ISO 14000: Meeting the Standard*, *supra* note 79, at 23; Sissell, *supra* note 61, at 53.

[93] American Political Network Greenwire Vol. 7, *Business and the Economy ISO 14000 Int'l Standard has not Taken Off in U.S.*, Apr. 2, 1998 *available in* 1998 WL 4/2/1998 APN-GR 14.

[94] *Environmental Concern Differs with Scale of Enterprise*, JAPAN CHEM. WK., May 29, 1996, *available in* 1996 WL 8148676.

[95] *101 Korean Firms Receive ISO 14000 Green Certificates*, ASIA PULSE, Feb. 6,

The United Kingdom's environmental management standard, BS 7750, is more ambitious than ISO 14000. Consequently, companies are relatively comfortable making minor adjustments to comply with the international standard in addition to BS 7750.[96] A 1996 survey of 84 major UK enterprises reported that 90% conducted an initial environmental review to compare themselves to the three major environmental management systems, while 33% were planning to certify to BS 7750, 25% to ISO 14000, and 19% to EMAS.[97]

In Europe, more than 668 industrial sites have registered to the EU's EMAS, primarily within Germany where some of the strictest environmental legislation in the world acts as a regulatory incentive for implementing an environmental management system.[98] European manufacturers regard government relations, customer demand, and community trust as the drivers behind ISO 14000 and the EU's EMAS certification.[99] Since EMAS is more stringent than the international environmental standard, EU firms may believe that compliance with EMAS will automatically place them in compliance with ISO 14000. Indicative of the market powers of globel competition, support for ISO 14000 is stronger than the EU's, EMAS and the European Commission recently decided to rewrite EMAS to conform more closely to ISO 14000.[100]

1997, *available in* 1997 WL 10502858.

[96] For example, David Allen, the managing director for textile dyes with Ciba Clayton, the chemical company that pioneered BS 7750, contends that once a firm has BS 7750 or EMAS in place, it is a logical step to meet the ISO 14000 standards. *Europe Gets A Head Start*, J. BUS. STRAT., Sept. 1, 1996, *available in* 1996 WL 10928576.

[97] The survey was conducted by Arthur D. Little. The U.K.'s BS 7750 has been operative since April, 1995. *Id.* As of spring 1998, 440 U.K. firms had certified to ISO 14000. American Political Network, *supra* note 93.

[98] Scott, *supra* note 23, at 21.

[99] Sissell, *supra* note 79, at 29. European firms and governments take certification seriously. One reason is that a firm certified to EMAS that violates an environmental regulation will be de-certified and cannot be re-listed (publicly) until regulators decide that corrective action has cured the violation. *Europe Gets a Head Start*, *supra* note 96.

[100] Alex Scott, *Environmental Management ISO 14000: Europe's Top Standard*, CHEM. WK., Sept. 24, 1997, *available in* 1997 WL 13975803.

In the United States, firms are comparing the merits of meeting ISO 14000 standards with designing or maintaining a company or industry-specific environmental management system.[101] Some firms are implementing the international standard on a site by site basis, or piloting the ISO EMS at one or two sites to determine whether expansion to other facilities is beneficial.[102] Despite a slower pace of implementation in the United States than in Europe, American enterprises have anticipated the ISO 14000 movement and are taking the opportunity to achieve ISO certification.[103]

F. Government Acceptance of ISO 14000

In the United Kingdom and European Union, governmental bodies were the impelling force behind environmental management systems. These governments, though keenly aware of the international recognition and authority that the ISO brings to environmental standards, prefer urging their citizens to meet the stricter standards of BS 7750 and EMAS.[104] If BS 7750 and EMAS are more regimented than the international standard, declaring compliance with ISO 14000 may be simply a formality for British and European

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[101] The Chemical Manufacturer's Association Responsible Care program is an example of an industry-specific environmental management system that is less stringent than ISO 14000. Sissell, *supra* note 59, at 54.

[102] The United Kingdom-based BOC group uses the BS 7750 program worldwide, but is evaluating the ISO 14000 system at two BOC Gases Americas sites in Maine and North Carolina before expanding the certification to other sites. Sissell, *supra* note 59, at 56. Akzo Nobel allows each business unit autonomy to develop its health, safety, and environmental management program within the guidelines of ISO 9000, ISO 14000, and Responsible Care. Sylvia Pfeifer, *Akzo Nobel Builds a Diverse Framework*, CHEM. WK., July 2, 1997, at 80. About 40 of Akzo's 250 sites worldwide are certified to the international standard. *Id.*

[103] Ford Motor Company has certified eleven plants to ISO 14000 and plans to certify the remainder of its plants worldwide within 1998. Sorge, *supra* note 64, at 52. Rockwell Automation's success in 1996 with 14000 implementation in its Twinsbury facility has led to a corporate wide goal to certify to ISO 14001 all 64 facilities under one registration. *Rockwell Automation Aims*, *supra* note 91.

[104] However, a European commission environment committee voted unanimously to allow companies certified to ISO 14001 to qualify for the European Union's EMAS. Scott, *supra* note 100, at 21.

firms.

Elsewhere, governments are urging compliance with ISO 14000 as a method for improving environmental protection domestically.[105] Many of Japan's local governments and government-affiliated organizations are lining up to obtain ISO 14000 certification.[106] In 1996, the Australian government presented awards to thirteen companies certified to ISO 14000 in an official ceremony demonstrating governmental support for the international environmental standard.[107] The government of India adopted the ISO 14000 standards in 1997.[108] After adopting the standards in early 1997, China's highest governing body, the State Council, established a committee to promote ISO 14000 implementation.[109]

In the United States, governmental support for ISO 14000 is increasing in strength. From the beginning of the ISO 14000 process, the United States Environmental Protection Agency (EPA) has been influential in the standards-drafting process and has steadily increased its support for the ISO standards.[110] The EPA recently published its official agency statement on ISO 14000 that endorses environmental management systems.[111] In addition, the EPA is heavily involved in

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[105] Sissell, *supra* note 61, at 53.

[106] *Japan's Local Government Embracing ISO 14000 Series*, ASIA PULSE, July 10, 1997 *available in* 1997 WL 11799426. The Japanese Ministry of International Trade and Industry adopted the ISO environmental management standard and enacted a Japanese version following the publication of the ISO 14001 and 14004 standards. The Japanese standard is part of the Japan Industrial Standard (JIS). *See Environment Briefs ISO 14000 Standard Series,* JAPAN CHEM. WK., May 15, 1996, *available in* 1996 WL 8148594; *Government Urged to Put Emphasis on ISO 14000 Standard Series*, JAPAN CHEM. WK., Jan. 24, 1996, *available in* 1996 WL 8148073; *Japan Version Worked Out for ISO Standard Series*, JAPAN CHEM. WK., Nov. 6, 1996, *available in* 1996 WL 11243880.

[107] Sissell, *supra* note 59, at 56.

[108] *Indian Government: BIS Draws Up Plans to Act as Certifying Body for Environmental Standards*, M2 PRESSWIRE, June 24, 1997, *available in* 1997 WL 11936036.

[109] *China Set to Expand Use of ISO Environmental Standards*, ASIA PULSE, May 5, 1997, *available in* 1997 WL 10651393; Sorge, *supra* note 64, at 52.

[110] As of mid-1997, Mary McKiel, EPA coordinator for ISO 14000 activity, was vice-chair of the United States Technical Advisory Group to ISO C207. *ISO 14000 Poses a Challenge, supra* note 17, at 14.

[111] EPA Position Statement on Environmental Management System and ISO

pilot projects with various governmental and corporate entities to determine the use of the international standards aimed at enhancing voluntary environmental programs.[112] In the spring of 1997, the ten-state MultiState ISO 14000 Working Group was organized to develop parameters for ISO 14000 pilot projects in the United States.[113] Unlike most states that are developing initiatives or pilot projects for environmental management systems, Illinois received statutory authorization in 1996 for its pilot projects.[114] This authorization occurred despite the EPA's warning that if states offer too much regulatory flexibility to promote ISO 14001, they risk disapproval of federally delegated programs.[115]

IV. UNCERTAINTIES SURROUNDING ISO 14000

The trend toward ISO 14000 implementation seems to be moving relatively rapidly and the benefits seem to significantly outweigh the disadvantages. However, there are three primary uncertainties concerning ISO 14000 implementation. The first concerns the drafting of international environmental standards. The second uncertainty is the usefulness of the certification process, and the third is whether ISO 14000 will create non-tariff trade barriers inconsistent with GATT and international trade law.

14001 and a Request for Comments on the Nature of the Data To Be Collected From Environmental Management Systems/ISO 14001 Pilots, 63 Fed. Reg. 12,094 (1998).

[112] *ISO 14000 Poses a Challenge*, *supra* note 17, at 14; Mark D. Anderson & Barney Lawrence, *States Plan Pilot Projects Promoting ISO 14001*, ENVTL. COMPLIANCE & LITIG. STRATEGY, Apr. 1997, at 4; *EPA Boosts ISO 14000*, CHEM. WK., Oct. 30, 1996, at 40.

[113] The states include Arizona, California, Illinois, Massachusetts, Minnesota, New Jersey, North Carolina, Pennsylvania, Texas, and Wisconsin. Anderson & Lawrence, *supra* note 112, at 4. The consortium also includes the United States EPA, the Environmental Law Institute, the law firm of Sidley and Austin, Tulane Law School, the National Institute of Standards and Technology, and the University of North Carolina-Chapel Hill. Sissell, *supra* note 79, at 29.

[114] Under delegated programs, such as those under the Clean Air Act or Resource Conservation and Recovery Act, states must ensure an effective enforcement program. Anderson & Lawrence, *supra* note 112, at 5.

[115] Anderson & Lawrence, *supra* note 112, at 5.

A. Who is Drafting the ISO 14000 Series?

Drafting an international standard is a politically charged drama. With the inception of Technical Committee 207 (TC 207), charged with drafting the ISO 14000 series, a power struggle has occurred between three main groups: the European Union, the United Kingdom, and North America.[116] The power struggle indicated the first uncertainty surrounding the international environmental standard: who is drafting the standard?

The subcommittee for drafting the EMS, one of six subcommittees comprising TC 207, is chaired by the United Kingdom. Not surprisingly, the EMS work groups relied heavily on the British environmental management standard, BS 7750.[117] The basic environmental management elements con-

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[116] *Environmental Management Standards Revisited: What You Need to Know Now,* BUS. & ENVIRONMENT, Dec. 1, 1993, *available in* 1993 WL 2736054. Passionate debate ensued concerning the dissimilarities of the various proposed environmental management systems, the difficulty of harmonization, and denunciation of the standards-setting process. Since national standards-making bodies continued to develop national or regional environmental standards, the greatest quandary in the initial stages of the ISO EMS development process was whether to adopt the United Kingdom's BS 7750, the European EMAS, one of the 16 other competing proposals by governments or industrial organizations, or develop a unique ISO environmental management system. The TC 207 members quickly chose to draft a unique ISO EMS. The decision to develop a unique standard was prompted by objections to certain elements in EMAS and BS 7750.

As the process of developing an international environmental standard has unfolded, the anxiety over differences among various proposals has subsided because the actual practice of harmonization has been less onerous than originally feared. For example, the United Kingdom, the European Union, and Japan have considered the potential impact of ISO 14000 in their standards-making efforts. As chair of the TC 207 Subcommittee on Environmental Management Systems, the United Kingdom was influential in achieving striking similarities between the BS 7750 environmental management system and the ISO EMS. Accordingly, the United Kingdom decided to grant British companies a choice among certification under BS 7750, the EMAS, or the ISO 14000 standards. The European standards body, CEN, concluded by the end of 1994 that the ISO 14001 EMS met the requirements of the EU's EMAS, despite some differences between the two sets of standards. A "bridge" document to harmonize the ISO and EU standards is under consideration. *European Standards Body Says ISO 14000 Will Meet Requirements of EU's EMAS*, BUS & ENV'T, Dec. 1, 1994, *available in* 1994 WL 2505075.

[117] BRITISH STANDARDS INSTITUTE, *Final Text of the Revision of BS 7750, Specification for Environmental Management Systems*, Doc. No. 93/400/461, Nov. 11,

tained within ISO 14000 were based upon the United Kingdom's BS 7750, as well as the European Union's EMAS standards. However, the BS 7750 and EMAS standards require a firm to issue an environmental statement verified by an accredited third party auditor or registrar, report environmental performance indicators to the public and communities directly affected by manufacturing operations, call for a register of known or suspected environmental effects, and require commitment to continuous improvement and sustainable development.[118] The United States, Canada and Japan objected to these requirements as being too strict and administratively burdensome.[119] The primary objection to the EMAS and BS 7750 by American industry was that the high level of public disclosure and commitment to continuous improvement required by the European and British environmental management system would be a disadvantage in the United States legal system, particularly in litigation.[120] As a result, by the final draft, any strength in a commitment to continual improvement, strict auditing requirements, and a high level of public disclosure was erased.[121]

The resulting standard irritated European environmentalists and representatives from environment ministries because the ISO EMS is less stringent than the EMAS mandate.[122] Thus, a leading criticism of the international environmental standard focuses on the apparent influence of cer-

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1993.

[118] *See Environmental Management Standards Revisited: What You Need to Know Now, supra* note 116 (reporting BS 7750 influence in drafting ISO standards); Murray, *supra* note 13, at 584-87 (discussing development of ISO standards); Scott, *supra* note 23, at 33-34 (comparing ISO standards to European environmental regulations).

[119] *Environmental Management Standards Revisited: What You Need to Know Now, supra* note 116 (discussing participants' view that BS 7750 is too "prescriptive").

[120] *Id.*

[121] *Id.*

[122] *See* Murray, *supra* note 13, at 579-80 (discussing criticisms of standards' purposes); Scott, *supra* note 23, at 33-34 (comparing ISO EMS standards to EMAS provisions); Sissell, *supra* note 61, at 53 (illustrating United States corporate skepticism regarding standards).

tain interests—in particular, United States multinational corporations—seem to exert extraordinary influence over the standards-setting process.[123] Environmentalists are legitimately concerned about the apparent imbalance of power in the Technical Committees. Much of the imbalance of power flows from the administrative procedures of the national Technical Advisory Groups (TAGs).

A national standards organization represents each nation member of TC 207.[124] The American National Standards Institute (ANSI) represents United States interests at TC 207. In turn, each national standards organization creates a TAG to assist in developing a national position on the standards. ANSI quickly established a TAG consisting of representatives from industry, government, and other interested stakeholders. According to ANSI International Procedures, the goal in organizing a TAG is to achieve "a balance of interests" among those parties developing a United States position for ISO activities.[125] However, 98% of representatives to the United States TAG for TC 207 are industry-related, thus creating an astonishing imbalance of interests.[126]

Unfortunately, voicing one's concerns in the standards-

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[123] Sissell, *supra* note 61, at 53.

[124] *See supra* notes 19-31 and accompanying text.

[125] AMERICAN NATIONAL STANDARDS INSTITUTE, ANSI-RAB NATIONAL ACCREDITATION PROGRAM CRITERIA FOR BODIES OPERATING REGISTRATION OF ENVIRONMENTAL MANAGEMENT SYSTEMS § 4.2 (Rev. ed. 1996).

[126] As of December 28, 1997, the American National Standards Institute (ANSI) internet site reported that 405 corporations, industry associations, or government agencies were represented on the United States TAG by approximately 500 individuals, while environmental interest groups were represented by ten individuals. *American National Standards Institute*, <http://www.ansi.org/home.html>. Examples of corporate members are DuPont, Merck, IBM, Unisys, Arco Chemical, Exxon, Mobil Oil, Allied-Signal, AMP, 3M, Texas Instruments, Motorola, Georgia-Pacific, International Paper, Caterpillar, AT&T, DEC, Kodak, Procter & Gamble, B.F. Goodrich, James River Corp., Weyerhaeuser, Raytheon, and ALCOA. *Id.*

David Mager of GreenAudit, Inc. urged, "[t]he consensus being built only represents these [corporate] perspectives. If you feel that their interests parallel your own, you're in luck. If not, you'd better get busy and make sure your concerns are known." *ISO Accord Lays Basis for World EMS Standard; Time Grows Short for Input,* BUS. & ENVIRONMENT, Nov. 1, 1994, *available in* 1994 WL 2505093.

making process is easier said than done for at least two reasons.[127] First, participation in a TAG is expensive.[128] TAG representatives pay dues and assessments of several thousand dollars upon membership and pay their own administrative and travel expenses incurred when sending individuals to the TAG meetings or performing TAG activities.[129] Since this expense can run into the tens of thousands of dollars per year, the simple fact is that industry can better afford the expense of TAG membership than non-profit organizations, academic institutions, or individuals.[130] Second, under current United States TAG procedures, recommendations for acceptance or rejection of an application to participate in TAG activities is at the discretion of the TAG administrator.[131]

The standards-making process for leghold trapping is a remarkable example of the standards-making process in general because it so clearly demonstrates the imbalance of power likely to occur in a technical committee and the United States TAG.[132] The imbalance of power was conspicuous from the

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[127] A report by the Canadian Institute for Environmental Law and Policy (CIELAP) cited financial constraints, the Canadian Standards Association's past efforts at environmental standards writing, and skepticism about effective representation of environmental interests given current CSA practices and procedures. *CIELAP Reports on NGO Involvement in Standards Writing*, ECO-LOG WK., May 30, 1997, *available in* 1997 WL 9031416.

[128] *Id.*

[129] ANSI, *supra* note 126.

[130] A very conservative estimate of expenses for one individual participating in a TAG for one year would be $17,475. This estimate is the sum of expenses for attendance at six meetings per year (per meeting expenses of $600 for round-trip airfare, five nights hotel expense at $120/night, fifteen meals at $10/meal, miscellaneous administrative expenses of $100), general administrative expenses ($350/month for secretarial, telephone, and correspondence expenses) for TAG activities, and TAG membership dues and assessments of $4,575.

[131] AMERICAN NATIONAL STANDARDS INSTITUTE, ANSI PROCEDURES FOR U.S. PARTICIPATION IN THE INTERNATIONAL STANDARDS ACTIVITIES OF THE ISO § A5 (1990).

[132] The process for developing an ISO standard for leghold traps was a heated dispute between fur trapping associations and animal welfare groups long before the inception of TC 191. The animal welfare groups argue that developing "humane" standards for leghold traps is impossible. Rather than resolve the issue, fur trappers stall to circumvent the development of an international standard. Patricia Doyle, *The European Community and Wildlife Supervision: The Sovereign*

commencement of TC 191, the technical committee charged with developing leghold trap standards. With a distinctly large constituency of trappers, Canada seized the chair of the TC 191 working group.[133] ANSI, the representative to TC 191, solicited the National Trappers Association (NTA) to serve as the United States TAG Administrator.[134] Animal welfare advocates endeavored to obtain representation on the United States TAG for TC 191, but were, and continue to be, underrepresented, thus creating a serious imbalance of power.

The Animal Welfare Institute (AWI) requested and received a place within the United States TAG. To pressure ANSI into meeting the balance of interests envisioned by ANSI procedures, AWI filed objections to the imbalance of power within the United States TAG organization and standards-making process.[135] Following a hearing, the ANSI Appeals Board issued their Findings of Fact, Conclusions, and Decision. The ANSI Appeals Board indicated in their Findings of Fact that they considered AWI's objections valid,[136] while

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Right to Protect Natural Resources, 9 N.Y. INT'L L. REV. 49, 64 (1996); EC Regulation 3245/91 (1995). The EU ban on leghold traps, originally to become effective in January, 1996, was postponed until January 1, 1997. Peter V. Michand, *Caught in a Trap: The European Union Leghold Trap Debate*, 6 MINN. J. GLOBAL TRADE 335, 336 (1997).

[133] The United States, Canada, and Russia are the three primary fur-exporting nations with substantial losses estimated from an EU ban on fur imports. In 1995, with the 1996 ban looming on the horizon, Canadians estimated losses of $150 million in fur sales to Europe and a significant impact on 40,000 Canadian trappers. Doyle, *supra* note 132, at 63-64. *See* E.C. Regulation 3245/91 (1995).

[134] *Animal Welfare Inst. v. U.S. Tech. Advisory Group*, AMERICAN NATIONAL STANDARDS INSTITUTE BOARD, Nov. 1, 1994, at 3.

[135] *Id.* at 1-2. The Animal Welfare Institute alleged: (a) a "complete lack of balance in the membership of the TAG;" (b) the TAG was dominated by a single interest (the fur trapping industry); (c) Tom Krause (Editor of *American Trapper*, the National Trappers Association publication) was unable to act as an impartial Chair; (d) the National Trappers Association was unable to fulfill the functions of Administrator pursuant to ANSI procedures; and (e) failure to fully disclose TAG documents. The Humane Society joined in the appeal of AWI on March 23, 1994. The hearing on the matter was held in Denver, Colorado on April 23, 1994. *Id.*

[136] Finding #17 states, "[Tom] Krause, as Chair, . . . a member of NTA and editor of the NTA publication . . . has attempted to act as an impartial Chair . . . . However, the NTA . . . is fundamentally in favor of maintaining the availability of leghold traps . . . ." Finding #21 states, "[e]vidence is very clear that

simultaneously dismissing the objections as inconsequential evidence of the impartiality of the TAG Administrator (NTA) and the Chair (Tom Krause, editor for the NTA's publication).[137] Ultimately, the ANSI Appeals Board concluded that the TAG's imbalance of power needed correction[138] and the imbalance of power meant that, "[e]arly TAG decisions were the result of a flawed process."[139] These conclusions suggest that AWI won a major battle. Remarkably, however, the ANSI Appeals Board decided to allow the NTA to continue as TAG Administrator as long as the NTA could provide sufficient financial and logistical support. Krause was allowed to continue as Chair because he received the support of the majority of the current TAG members. This illogical decision only perpetuated the problem.[140]

If the experience of AWI is indicative of the barriers that face environmentalists interested in participating in the ISO standards-making process, then the ISO standards-making process is probably not representative of all interested stakeholders and the "international" standards lack some

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Krause, as well as a majority of TAG members . . . concur that steel-jaw leghold traps are worthy of research and consideration." Finding #26 states, "[Animal Welfare Institute] and [Humane Society of the United States] represent a minority viewpoint on the TAG, even though they represent a significant constituency (greater than 1,000,000 members combined). They have a strong argument in that they are merely 'tokens' on the TAG." Finding #27 states, "[a]t one time . . . it was noted in the minutes that a precondition to membership on the TAG should be that an applicant's agenda 'not be to abolish trapping.'" *Id.* at 4-5.

[137] For example, Finding #22 states, "[e]vidence brought forth to demonstrate Krause's lack of impartiality . . . is concerning and confusing, but does not firmly demonstrate Krause's inability to continue as Chair." *Id.*

[138] Conclusion #24 states, "[t]he difficulty of animal well-being representatives . . . in becoming TAG members indicate that barriers do exist to TAG membership." Conclusion #25 states, "the domination by a single interest certainly impeded communication to people or groups holding alternative viewpoints." Conclusion #26 states, "[i]t is the present Administrator's responsibility (overseen by ANSI) to fix this flaw." *Id.* at 8-9.

[139] *Id.* at 8.

[140] Financial and logistical support should not be a key consideration in selecting an Administrator if the goal of structuring the TAG is to achieve a "balance of interests." Moreover, if the concern is that a single interest dominates the process, then support of the majority for an individual such as Krause, who represents that dominant interest, should be suspect at the very least.

credibility. Nevertheless, to the relief of environmental interests, the ISO 14000 standards-making process may not be as compromised as the TC 191 leghold trap standards because powerful governmental agencies and other interests concerned with environmental protection are involved in developing the TC 207 environmental management standards. For example, the United States EPA was influential in the EMS drafting process because it refused to give the standard its blessing unless the EMS draft contained two changes.[141] First, the EPA dictated that one element of an organization's environmental policy was a mandatory commitment to pollution prevention. Second, the EPA required the section on corrective action to contain a direction for periodically evaluating compliance with relevant environmental legislation and regulation. Without the EPA's blessing, ANSI could not have provided American support to the draft standard.

Since ISO 14000 sets forth a comprehensive system for managing environmental performance rather than detailing product specifications or specific production targets everyone can meet, the international environmental management standards should demonstrate the best business practices, not the lowest common denominator. Business and industry in Canada, the European Union, and the United States must meet strict environmental standards within their own nations. Therefore, in addition to pressure from domestic environmental agencies, firms will attempt to drive the international standards to a higher degree of complexity to reduce the competitive advantage that might result for companies in nations without environmental laws.

Significantly, for those firms or environmentalists interested in ensuring that environmental protection is the ultimate goal, time permits some input into the ISO 14000 pro-

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[141] *ISO 14000 Update: Draft Global EMS Standard Approved, with Some Changes*, BUS. & ENVIRONMENT, Mar. 1, 1995, *available in* 1995 WL 8380342. As of mid-1997, EPA coordinator for ISO 14000 activity, Mary McKiel, was vice-chair of the United States Technical Advisory Group to ISO C 207. *ISO 14000 Poses A Challenge*, *supra* note 17, at 14.

cess. Interested stakeholders may have to overcome barriers to entrance if they desire a place on the United States TAG. However, participating in the work of a TAG subcommittee or influencing the standards-setting process through personal contact with individual TAG representatives is less arduous a task, and such influence can be substantial. The fact that the standards-setting process may be influenced by individual interests testifies to the market dynamic that will evolve affecting ISO 14000 implementation.

B. Will Certification to ISO 14000 Be Meaningful?

Certification, also referred to in the United States as registration, is the process by which a third party gives written assurance that the applicant organization conforms to standard requirements. Certification to ISO 14001 demonstrates that a firm adheres to the criteria for the ISO 14000 environmental management system. Many American firms are strong supporters of the ISO environmental management system, but are reticent about the certification process solely because of the lack of strong customer demand for certification to the ISO 14000 standards. For companies that already have an environmental management system in place, the type of industry makes a difference in whether a company takes the extra step to obtain certification. In the chemical, pharmaceutical and electronics industries, the market has not yet forced certification to ISO 14000. However, the three industries represent the bulk of certifications in the United States thus far.[142] AlliedSignal Corporation, one of the key players in developing the ISO EMS, implemented the ISO environmental management system, but decided to wait until market drivers

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[142] *ISO 14000 Update, supra* note 141, at 38. Thirty-nine major electronics firms, including Motorola and Hewlett-Packard, were promoting a process in which a single certificate would be provided for ISO 9000 and ISO 14000 compliance. Amy Zuckerman, *Stanching the Flow of New Quality Standards*, NEW STEEL, Sept. 1, 1996, at 82, 84. However, TC 176, the Committee revising the ISO 9000 series of quality management standards, announced it would not combine ISO 9000 and ISO 14000. Rick Mullin, *Rewrite Aims for "Elegant Simplicity"*, CHEM. WK., Apr. 8, 1998, at 42.

demonstrate that certification was necessary.[143] The steel industry is similarly hesitant about the certification process.[144] One potential motivation for ISO 14000 certification may be regulatory agency action. If regulators provide incentives to certifying firms, industry is more likely to choose certification to the international environmental standard.[145]

From the perspective of environmentalists, regulators, and members of industry with foresight, the primary certification issue should be whether the certification process will become a meaningless formality in which certification cloaks poor environmental stewards with the image of good environmental performance.[146] The certification process could become merely a sham for three reasons. First, third-party auditor and certification organizations are emerging across the globe to register and certify firms to ISO 14001.[147] To be credible, auditors and registrars must be trustworthy, accredited by an authorized accreditation body, and staffed with personnel skilled in ISO 14000. The integrity of the certifica-

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[143] Sissell & Mullin, *supra* note 34, at 53. Similarly, Dow Chemical and Union Carbide have test programs in place for ISO 14000, but will withhold obtaining certification unless it is necessary for competitiveness. Kara Sissell, *One Size Fits All: Unifying ISO Management*, CHEM. WK., Apr. 3, 1996, at 27.

[144] A steel industry publication reported that Slater Steels, Stelco Fasteners, Birmingham Steel, and U.S. Steel will not try to certify to ISO 14000 until the customer base demands certification or until the proliferation of standards worldwide reduce to one international standard. Zuckerman, *supra* note 142, at 85-86.

[145] Jim Merriam, BOC Group (UK) environmental affairs manager, said, "[i]f our customers begin demanding it, if there are discounts with insurance, or it is of value internally, certification may be worthwhile. If not, BOC may hold off seeking certification of additional sites." Sissell, *supra* note 59, at 56. *See supra* notes 57-73 and accompanying text.

[146] *See generally* Murray, *supra* note 13; Robinson, *supra* note 13; Scott, *supra* note 23; *Stakeholder Involvement in ISO 14000, XL Seen as Hard to Swallow, But a Necessity*, PESTICIDE & TOXIC CHEM. NEWS, June 26, 1996, *available in* 1996 WL 8852591.

[147] The Institute of Internal Auditors and the Environmental Auditing Roundtable plan to form a not-for-profit joint venture to certify environmental auditors for ISO 14000 standards. In Canada, the ISO has teamed with the Canadian Institute of Chartered Accountants and the Canadian Environmental Auditing Association to develop a set of environmental auditing credentials. *New ISO Certification Planned*, PRAC. ACCT. MAG., May 19, 1997, *available in* 1997 WL 8955034.

tion process necessitates that the third-party auditing organizations be ethical and maintain independence with regard to the results of the audit.[148] In a typical non-ISO audit, the company under inspection hires the auditing firm and offers its attorneys the opportunity to review and edit the auditor's results. Such editing defeats the disclosure of actual audit results.

Registrars and ISO consultants believe a serious compromise to third-party independence has already occurred.[149] In January, 1997, ANSI approved an alternate form of ISO 9000 and 14000 registration, designated as Supplier Audit Confirmation (SAC). The SAC alternative allows a firm to use internal resources for audits typically performed by third-party registrars. A registrar, at its discretion, may determine that an applicant firm has effective internal management systems and allow the firm to use the SAC alternative. The SAC alternative increases the probability that actual audit results will be edited. Furthermore, the alternative goes beyond the self-certification allowed under ISO 14000 by placing a third-party stamp of approval on a firm that did not undergo a third-party audit. Persons genuinely interested in protecting the environment should oppose the SAC approach and take action to ensure that additional incursions upon the integrity of the ISO 14000 certification process do not take place.

The second reason that the ISO 14000 certification process could devolve into a meaningless task is that careless managers could supply inaccurate information to third-party auditors or certification registrars. The inaccurate information could imply that the firm has better environmental performance than actually exists. Several points exist in the EMS process where negligent conduct could render information useless. For example, the EMS initial review could overlook an environmental aspect of the firm's activities, such as a recent change in chemical storage regulations. A miscalculation con-

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[148] Interview with Craig N. Johnston, Associate Professor of Law, Northwestern School of Law of Lewis and Clark College, in Portland, Oregon (Nov. 1996).

[149] *ISO Audit Alternative*, CHEM. WK., Jan. 29, 1997, at 68.

cerning the environmental impact of product "X" might occur or an employee may fail to take measurements properly.[150] Fortunately, the internal auditing and monitoring process incorporated into the ISO environmental management system is designed to reveal misinformation and allow for correction. Progressive companies and regulators need to oversee the certification process to ensure that auditors are trained to detect careless activity.

A third possible situation would reduce the certification process to a sham. The drafters of ISO 14000 EMS developed an original standard which is a fundamentally weaker version of the progenitor standards (BS 7750 and EMAS).[151] As a result, the potential for fraud, such as claiming continual improvement, regulatory compliance, or good environmental stewardship, is considerable. To prevent the devolution of the certification process to a pretext, third-party auditors and certification organizations must ensure that the process of certification gains legitimacy in the eyes of industry, governments, and environmentalists. Third-party auditors will enhance the ISO 14000 certification process if registrars allow only the most trustworthy organizations to self-certify, self-police the registrar or auditing industry, and detect organizations that manipulate or conceal information to imply compliance with environmental performance standards when accurate data indicates the contrary. Bluntly stated, certification organizations must not certify a fraudulent company to ISO 14001.

Given the possibility that meaningless information could be supplied to registrars and the public, regulatory measures such as inspection and reporting requirements must compel regulatory compliance until a significant track record demonstrates that ISO 14000 certification is a meaningful process. Industry associations, environmental organizations, and regu-

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[150] The old adage, "garbage in, garbage out," is most apt in the certification process. Careless design of environmental objectives and sloppy measurement taking, calculations, and monitoring leads to meaningless reports.

[151] *See supra* notes 114-39 and accompanying text.

lators should perform oversight functions to assist in the development of a convincing track record. For instance, the Forest Stewardship Council, an international nonprofit association, developed industry-specific guidelines for certification organizations and will accredit third-party certifiers of forest claims. Environmental organizations should examine industry certification guidelines to determine whether the industry's goals are consistent with the certification goals of environmentalists.

Prudent organizations will benefit from a meaningful ISO environmental management system and outside stakeholders will benefit from a meaningful benchmark. However, if a company chooses not to pursue certification, the ISO environmental management system provides a firm with the opportunity to implement a disciplined process of environmental management without the added expense and inconvenience of certification.[152] The bottom line underlying certification to ISO 14000 is that the certification process, if used to its full advantage, must have integrity and inherent value. Only time and the vigilance of interested stakeholders will establish whether certification will reach its full potential as a benchmark for use by consumers, regulators, businesses, and environmentalists of all nationalities. Nevertheless, if the certification process deteriorates or becomes mired in corruption, the international environmental management standard is not necessarily sullied and may have value independent of certification.

C. Will ISO 14000 Create Trade Barriers?

Principles of international trade law, set forth in the General Agreement on Tariffs and Trade (GATT), impose two primary obligations upon nations: (1) the most favored nation principle prohibits nations from discriminating among prod-

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[152] "Gaining certification for the purpose of public approval deflects from the process of developing a strategy," said Joanna Underwood, president of the consulting firm Inform. Underwood added that the point is to focus on developing a system, not to focus on receiving certification. Sissell & Mullin, *supra* note 34, at 53.

ucts based upon the nation of origin, and (2) the national treatment principle requires nations to treat foreign products in a manner equal to "like" domestic products.[153] However, nations may regulate the products for the purpose of protecting human health, safety, and the environment as long as there is equal treatment of "like" domestic products.[154] Despite the environmental exception, national efforts to enact trade laws designed to protect the environment have run afoul of GATT principles on several occasions. The most publicized case, referred to as Tuna/Dolphin I, was the United States embargo on imports of tuna caught "on dolphin."[155] A GATT dispute resolution panel concluded that the method of catching

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[153] The original document setting forth principles of international trade law was published in 1947 (hereinafter GATT). The Most Favored Nation (MFN) principle is set forth in article I, section 1. The National Treatment principle is set forth in article III. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187. The principles of GATT have been incorporated into an updated agreement creating a formal administrative and adjudicatory institution known as the World Trade Organization (WTO). General Agreement on Tariffs and Trade: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, substantially *reprinted in* 33 I.L.M. *1 (1994), and *reprinted in* Law & Practice of the World Trade Organization (Joseph F. Dennin ed., 1996) [hereinafter GATT 1994].

[154] The two environmental exceptions, set forth in Article XX of GATT, allow a nation to justify a discriminatory measure if the measure is "necessary to protect human, animal or plant life or health" [XX(b)] or "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption" [XX(g)]. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187, Article XX (b) and (g).

[155] The Ninth Circuit Court of Appeals enjoined the importation of yellowfin tuna from Mexico because of the extraordinary number of dolphins killed by Mexican tuna fishermen. *Earth Island Inst. v. Mosbacher*, 929 F.2d 1449 (9th Cir. 1991). The Mexican fishing method uses easily-located schools of dolphin to locate tuna beneath the surface, hence the phrase "caught on dolphin," and nets both dolphin and tuna. The Ninth Circuit based its injunction on provisions of the United States Marine Mammal Protection Act. *Id.* at 1453. Mexico challenged the decision under GATT. GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, Aug. 16, 1991, 30 I.L.M. 1594, 1598 (1991). The GATT dispute resolution panel determined that the United States violated the National Treatment principle of Article III because the measure related to process rather than product. *Id.* at 1618. The panel also found that the measure was a quantitative restriction and violated Article XI because the United States imported tuna caught by other methods. *Id.* at 1621.

the tuna related to production process methods and not "product" characteristics, thus it discriminated between "like" products and violated the national treatment principle.[156] Since Tuna/Dolphin I, other GATT or WTO panel decisions have indicated that there may be an inherent conflict between free international trade and environmental concerns.[157]

The International Standards Organization developed the ISO 14000 standards in response to the plea for international environmental standards embodied in Agenda 21.[158] Since the ISO 14000 program is completely voluntary and market-driven, GATT does not apply directly to the international environmental standards.[159] Moreover, the standards are procedural in nature and do not specify substantive performance requirements. Indeed, the standards declare that they are "not intended to be used to create non-tariff barriers or to increase or change an organization's legal obligations."[160] However, *de facto* trade barriers may arise if consumer demand and industry practice effectively deny free access to markets, or if government regulators begin to treat businesses certified to ISO 14000 disparately from those not in compliance with the international environmental standards.[161] The impact on trade could be significant. In 1996, during a congressional hearing about ISO 14000, ANSI reported that United States industry could lose approximately $30 billion in exports annually because of technical trade barriers related to standards and certification.[162] One survey found that 61% of 115 large Unit-

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[156] *Id.* at 1618.

[157] *See generally* Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?,* 26 ENVTL. L. 841 (1996).

[158] *See supra* notes 1-17 and accompanying text.

[159] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *reprinted in* H.R. Doc. No. 316, 103rd Cong., 2d Sess. 1326 (1994) (establishing the World Trade Organization). GATT negotiators are currently considering whether to adopt ISO 14000 to avoid artificial trade barriers from country-specific requirements. *See generally* Murray, *supra* note 13; Wold, *supra* note 157.

[160] INT'L STANDARD: ISO 14001, at v.

[161] *See generally* Murray, *supra* note 13; Robinson, *supra* note 13; Wold, *supra* note 157.

[162] The congressional hearing on international standards was held on June 4,

ed States firms expected that ISO 14000 implementation would offer a competitive advantage, and 48% said that failing to implement ISO 14000 could constitute a "potential non-tariff trade barrier" if customers demand compliance with the international environmental standards.[163]

If a nation embodied ISO 14000 aspects in domestic environmental regulations or policies so as to create a *de jure* trade barrier, then the principles of GATT would certainly apply. A national government could file an objection to the trade barrier with the World Trade Organization (WTO) on behalf of its injured citizen.[164] WTO established in 1994 as the successor organization to GATT, uses GATT principles but has more adjudicative power than the former GATT dispute resolution panels.[165] If the WTO dispute panel determined that the measure violated GATT 1994, the nation would be in violation of international law. For example, the United States could not enact a trade law requiring all ceramic coffee cups to be manufactured pursuant to an ISO 14001 certified environmental management system because a production method developed as part of an environmental management system is unrelated to the product characteristics of a coffee cup.

On the other hand, the United States could enact a trade law barring the sale of all ceramic coffee cups, domestic or imported, that contain detectable levels of lead or mercury. The measure would violate Article III of GATT because it relates to production process methods rather than product characteristics, but it would fall within the Article XX(b) ex-

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1996. *ISO 14000 Hailed as Savior, Questioned as Problematical, in Congressional Review*, *supra* note 70. Sergio Massa, president of ANSI, urged that, "[s]ince it is estimated that each billion dollars in exports translates into 20,000 American jobs, it is apparent that standards and conformity assessment issues are of critical importance to the economic well-being of the United States." *ISO 14000 Hailed as Savior, Questioned as Problematical, in Congressional Review*, *supra* note 70.

[163] Begley, *supra* note 73.

[164] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *reprinted in* H.R. Doc. No. 316, 103rd Cong., 2d Sess. 1326 (1994) (establishing the World Trade Organization).

[165] *Id.*

ception because the purpose of the regulation is to protect human health, safety, and the environment. A sound scientific basis regarding the effects of lead and mercury would support the argument that the exception applied to the case. Interestingly, the better the technology for detecting minute levels of hazardous substances, the easier it would be to prohibit certain products from entering the country.[166]

Investment or product recovery, commonly known as "take-back" systems, requires a firm to "take-back" a worn out product and either recyle the components or dispose of the waste in an environmentally sound manner.[167] Investment recovery is an essential part of the life cycle assessment phase of the ISO 14000 process and may become a testing ground for trade barrier disputes. As of July, 1997, legislation for product recovery was in draft or final form in eight European countries, primarily for products such as electronic equipment or household appliances.[168] Although environmentally sound and consistent with ISO 14000 ideals, the measures may run afoul of GATT 1994 principles because the measures, like the Tuna/Dolphin I import embargo, are related to production process methods (PPMs) rather than product characteristics. Thus far, targeting PPMs with import regulations to impact environmental agendas has not passed the scrutiny of the GATT panels or the first WTO panels.[169]

As part of an international effort to harmonize national standards and prevent the creation of *de jure* trade barriers,

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[166] C. Foster Knight, *Voluntary Environmental Standards vs. Mandatory Environmental Regulations and Enforcement in the NAFTA Market*, 12 ARIZ. J. INT'L & COMP. L. 619, 632 (1995). This technique would work to effect strategies designed to reduce environmental impacts, but reliance on this method is too diffuse to effect a comprehensive environmental agenda.

[167] *See supra* note 52 and accompanying text.

[168] *See European Lawmakers Set the Pace*, J. BUS. STRATEGY, July 19, 1997, *available in* 1997 WL 9417594.

[169] The WTO has reviewed trade disputes and WTO decisions seem to be consistent with narrow GATT dispute panel decisions. *See World Trade Organization Appellate Body in United States—Standards for Reformulated and Conventional Gasoline*, 35 I.L.M. 603 (1996). For in-depth discussion of various GATT and WTO panel decisions, see Wold, *supra* note 157, at 856-60.

two agreements were made part of the Uruguay Round of Multilateral Trade Negotiations: the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)[170] and the Agreement on Technical Barriers to Trade (TBT Agreement).[171] The TBT Agreement applies to government regulations on products such as size, quality, or emissions levels. The TBT Agreement specifically creates a preference for voluntary international standards to be used where they exist or where their completion is imminent.[172] The restriction contained within the TBT Agreement on the use of standards in legislation is that national regulations must be "not more trade restrictive than necessary" to meet the given objective of the national standard.[173] The SPS Agreement applies to food, crop, or livestock health.[174] Like the TBT Agreement, the SPS Agreement creates a preference for voluntary international standards and a restriction that national regulations must not be more trade restrictive than required.[175]

The SPS and TBT agreements embrace the concept of international standards, granting a rebuttable presumption that national trade measures consistent with international standards do not constitute trade barriers.[176] However, na-

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[170] The Agreement on the Application of Sanitary Phytosanitary Measures is contained within *GATT: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, 33 I.L.M. 1125, Annex 1A (1994), *reprinted in* H.R. Doc. No. 103-316, at 1382 (1994).

[171] *Id.* at 1428.

[172] "The GATT Agreement on Technical Barriers to Trade requires parties to use international standards, when they exist, as a basis for technical regulations. Environmental concerns can be expected to generate a growing number of such regulations: the establishment of international standards for environmental protection is thus a matter of some urgency and could help to avoid misuse of these regulations." *Report of the Secretary-General of United Nations Conference on Trade and Development (UNCTAD) subcommittee to the Secretary-General of the Conference pursuant to General Assembly resolution 45/210*, Preparatory Committee for the United Nations Conference on Environment and Development, Plenary Sess., Agenda Item 2B, at 16, U.N. Doc. A/CONF. 151/PC/48 (1991).

[173] *Id.*

[174] *See supra* note 168 and accompanying text.

[175] *See supra* notes 169-70 and accompanying text.

[176] *GATT: Multilateral Trade Negotiations Final Act Embodying the Results of*

tional standards may not be designed with the intent of, or have the effect of, creating unnecessary obstacles to international trade.[177] In 1991, the EC enacted a regulation banning steel-jaw leghold traps within the EC effective January 1, 1995.[178] The regulation prohibited EC nations from importing furs from countries where use of the steel-jaw leghold trap continued, unless the fur-exporting countries had adopted international standards for humane trapping methods.[179] This regulation was one of the first to use international standards as a benchmark, and a challenge is still pending.

Since the ISO 14000 standards are voluntary, as long as the standards remain market-driven and regulations are consistent with the international standards, ISO 14000 will not transgress the trade rules of GATT. If the voluntary ISO 14000 standards work as intended to effect environmental protection goals, the international environmental standards may obviate the need for national regulations.[180] On the other hand, if the standards are embodied in national regulations so as to be more restrictive than necessary, ISO 14000 may run aground on the rocky shoals of recent GATT and WTO jurisprudence that has disallowed every attempt at environmental protection.

V. Recommendations for Using ISO 14000 as a Tool for Environmental Protection

The global trend is for business and industry to implement ISO 14000 or the more stringent EMAS or BS 7750 to achieve environmentally protective goals. Unfortunately, the positive trend could fall victim to businesses that believe the underlying reason for declaring good environmental stewardship is not environmental protection, but the more mercenary

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the Uruguay Round of Trade Negotiations, 33 I.L.M. 1125, Annex 1A (1994), *reprinted in* H.R. Doc. No. 103-316 at 1428 (1994).

[177] *Id.*

[178] Council Regulation 3254/91, 1991 O.J. (L 308) 1.

[179] Council Regulation 3254/91, art. 3, 1991 O.J. (L 308) 1. *See supra* notes 5, 130-38 and accompanying text.

[180] Roht-Arriaza, *supra* note 10, at 532.

goal of avoiding regulation.[181] Firms and interested stakeholders should battle any attempt to merely convince the public of good intentions. Allowing ISO 14000 to be a cloak of good environmental stewardship for a deceitful corporation to display would be a travesty.

Recalling the uncertainties about the dynamics of ISO 14000 implementation, ISO 14000 proponents should: (1) ensure that the United States TAG and TC 207 members keep the environmental goals of Agenda 21 foremost in their minds when drafting the ISO 14000 standards; (2) ensure that the certification process has integrity and value to interested stakeholders; and (3) prevent legislators from embodying the standards in legislation so as to create trade barriers and endangering the viability of the international environmental standards. Several methods exist for an individual or organization to utilize ISO 14000 as a tool for environmental protection.

For example, assuming that the ISO 14000 standards-making process is dominated by industry interests who might consider the goals of Agenda 21 a low priority, an individual or environmental organization must pressure the TAG to obtain better representation of environmental interests within the TAG. Specific activities to compel that change could include requesting a seat on the TAG, coordinating with other environmental organizations to pressure the TAG for representation, developing a network of TAG members that might support an increased environmental agenda within the TAG, and appealing any denial of representation.

As another example, several American states and the United States EPA are examining various incentives for companies that certify to ISO 14000 or perform environmental audits.[182] Some states are considering foregoing minor penal-

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[181] Peter Fairley, *States Test Facility-Wide Permits*, CHEM. WK., Oct. 16, 1996, 51.

[182] The EPA proposed a final policy on environmental audits that eliminated or substantially reduced the gravity component of civil penalties and recommended no criminal prosecution when an entity voluntarily self-disclosed and promptly corrected violations following an environmental audit. Incentives for Self-Policing:

ties for companies that self-report regulatory violations discovered during an environmental audit.[183] Such measures may provide a reasonable attempt to balance the goals of enforcement and incentives for compliance-assurance activities.[184] Some states, though, have either passed or are considering the creation of an evidentiary privilege that would shield documents associated with environmental audits from public disclosure.[185] This evidentiary privilege is the antithesis of the ISO 14000 goals for public disclosure, especially since a key element of ISO 14000 is communication to and consideration of community interests. The evidentiary privilege seems to be "the wrong solution to the right problem."[186] An interested stakeholder could form action groups to write legislators, testify before congressional committees, contact industry leaders to voice concern, contact the media to inform the public about the meaning of an evidentiary privilege, develop petitions, place informational advertisements in state newspapers or on the internet, or bycott companies pressuring legislators to enact the evidentiary privilege.

The key to using ISO 14000 as a tool for environmental protection is to know the target audience.[187] Since firms are

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Discovery, Disclosure, Correction and Prevention of Violations, Final Policy Statement, 60 Fed. Reg. 66706, 66706-07 (1995).

[183] Anderson & Lawrence, *supra* note 112, at 5; Sissell, *supra* note 79, at 29.

[184] Craig N. Johnston, *An Essay on Environmental Audit Privileges: The Right Problem, The Wrong Solution*, 25 ENVTL. L. 335, 344-47 (1995).

[185] *See e.g.,* COLO. REV. STAT. ANN. §§ 13-25-126.5(3), 13-90-107(j)(I)(A), 25-1-114.5 (West 1994); IND. CODE ANN. §§ 13-10-3-1 to -12 (Michie 1994) (repealed 1996); OR. REV. STAT. § 468.963 (1) (1993).

[186] Johnston, *supra* note 184 at 344-47.

[187] Ciba-Geigy senior vice-president Joseph Sullivan emphasized the vital importance of voicing concern for the environment to the right audience. Sullivan, a speaker during a conference on sustainable development, stated that the attendees at the conference did not need convincing that sustainable development was an imperative, but the shareholder's expectations "will make it difficult for sustainable development to survive." Sullivan's statement attests that shareholders—those who control the pocketbook—are the ears of the corporation and the keys to the changing corporate behavior. In other words, if shareholders hold the keys to moving a corporation in the right direction, then the shareholders are the target audience for the environmental message. *Congratulations All Around for 33/50 Program Success; Something New Pledged*, PESTICIDE & TOXIC CHEM. NEWS, Sept.

measured on profit, a consumer at any level might change the rules that affect profits and change the company's behavior.[188] For example, a grocer might examine available market research and the web of environmental regulations. The grocer, after evaluating the information, might desire a competitive advantage in the "greener" global marketplace and the opportunity to be a good environmental steward. The grocer can take a proactive strategy to strengthen international environmental standards.[189] The grocer might:

(1) purchase consumer products that are pesticide-free or organically grown, packaged in reusable or recyclable containers, grown in areas of sustainable development, biodegradable, made from recycled paper or plastic, baked with products derived from a healthy rainforest, or labeled with non-toxic inks;

(2) hire a community outreach staff member to design product information notices to affix to shelving, provide free pamphlets to community groups about eating healthy foods, write legislators to urge adoption of regulations promoting environmental protection, or provide educational talks about environmental awareness to community schools; or

(3) donate a percentage of profits to environmental organizations and provide recycling containers for customers to use.

Individuals and organizations interested in promoting environmental protection should be wary of entities that promote the image of good environmental stewardship but behave irresponsibly.[190] For example, DuPont Corporation controlled

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18, 1996, *available in* 1996 WL 8852857.

[188] Interview with John H. Evers, D.E., Member Group Technical Staff, Six Sigma Black Belt, Cycle Time Black Belt, Systems Group, Raytheon (Oct. 18, 1996).

[189] *See* Joseph F. DiMento & Francesco Bertolini, *Green Management and the Regulatory Process: For Mother Earth, Market Share and Modern Rule*, 9 TRANSNAT'L LAW 121, 136-37 (1996).

[190] Fred Krupp of the Environmental Defense Fund said, "[w]hen I see CMA (Chemical Manufacturers Association) talking about their 'responsible care' program and environmental stewardship one day, and then the next day, supporting

over 50% of the United States market and 25% of the international market of CFCs during the 1980s.[191] In 1987, The Montreal Protocol was signed to reduce the production and consumption of CFCs.[192] In response, DuPont announced its decision to discontinue the production of CFCs. By 1990, DuPont had invested more than twice the amount invested by the remainder of the chemical industry in developing alternative products.[193] DuPont's strategy to achieve a competitive edge was to compel regulators to force consumers to move toward substitute products.[194] While DuPont's strategy seems to demonstrate that good environmental stewardship was the firm's foremost goal, DuPont is often classified as one of the most environmentally destructive companies in the United States.[195] Moreover, DuPont intentionally delayed phasing out CFCs for fifteen years because of its large market share.[196] When the deadline for phase out of CFCs drew near, DuPont promoted HCFC, a less potent ozone-depleting substitute, rather than developing environmentally-friendly alternatives.[197]

Interested stakeholders in the ISO 14000 implementation process have the ability to influence firms that might waver between good environmental steward and environmental tortfeasor. Similarly, the standards-setting, legislative, and certification processes may be influenced to promote an envi-

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the most extreme positions on regulatory reform on Capitol Hill, I have to ask myself, 'what is going on here?' but it's all too clear. What is going on, is an attempt to paralyze the process. . . ." *Browser Promises Facilitators for CSI Meetings*, PESTICIDE & TOXIC CHEM. NEWS, May 24, 1995, *available in* 1995 WL 8217962.

[191] CFC's are Clorofluorocarbons, which are chemicals linked to the degradation of the ozone layer. DiMento & Bertolini, *supra* note 189, at 138.

[192] *See* Rowlands, *The Fourth Meeting of the Parties of the Montreal Protocol: Report and Reflection*, 35 ENVT. 25 (1993).

[193] DiMento & Bertolini, *supra* note 189, at 138.

[194] DiMento & Bertolini, *supra* note 189, at 137.

[195] *Id.* at 138, n.53.

[196] *Id. See also* Faye Rice, *Who Scores Best on the Environment?*, FORTUNE, July 26, 1993, at 114 (discussing how DuPont sat on opposite side of environmental debate for years).

[197] DiMento & Bertolini, *supra* note 189, at 138, n.53.

ronmentally responsible behavior. Proactive involvement of interested parties is critical for environmental management systems such as ISO 14000 to achieve the goal of better environmental protection.

VI. Conclusion

The two primary benefits to an organization implementing the ISO 14000 standards are competitive advantage and corporate environmental responsibility. Competitive advantage derives from improved management processes, materials and energy conservation, reduced costs of operation, improved risk management, and improved community relations. The two primary disadvantages of ISO 14000 for industry members relate to the potentially substantial costs associated with the implementation of the ISO EMS and the public disclosure requirements of ISO 14000, which are probably less onerous than perceived. Most industry analysts agree that the rewards to industry members implementing ISO 14000 far outweigh the drawbacks of ISO 14000 compliance. With regard to the environment, there are significant benefits that may accrue from ISO 14000 implementation since any improvement in a company's environmental performance is a benefit to the environment. The possible disadvantage to the environment is that an unscrupulous firm could cloak itself with the appearance of good environmental stewardship; however, this impersonation of the good citizen occurred before the existence of ISO 14000.

Uncertainties about the dynamics of ISO 14000 implementation include: (1) whether the drafters of the international environmental standards will uphold environmental protection as the primary goal, as originally intended; (2) whether the certification process will be a meaningful benchmark to identify good environmental stewardship; and (3) whether ISO 14000 will create non-tariff trade barriers. Proactive involvement of environmentalists and progressive corporations can influence the direction of ISO 14000 implementation positively. Proactive involvement includes such activities as becoming involved in and influencing the ISO 14000 standards-making

process to ensure that environmental protection is the ultimate goal, refusing to relax the command and control regulatory structure until environmental stewardship is as much a part of a company's daily activities as accounting or advertising, watchdogging the certification process to ensure that it is a legitimate benchmark rather than a shield for dishonest firms, and voicing concerns about environmental performance to a company's executive management or board of directors. Involvement by industry and consumers will help to ensure that voluntary market mechanisms, such as ISO 14000, drive advancement towards the environmental protection goals of Agenda 21.

COMMENTS

1997 MISSISSIPPI SUPREME COURT REVIEW

INSURANCE

In 1997, the Mississippi Supreme Court rendered sixteen decisions concerning insurance law. This review will focus on decisions which have either changed, extended, or clarified existing law. The most notable cases addressed issues of bad faith denial of benefits, uninsured motorist benefits, interpretation of policy language, and the equitable lien doctrine. The supreme court also rendered decisions regarding the following issues: construction of credit life regulations,[1] self-insurance,[2] subrogation,[3] concealment clause,[4] the punitive damages stat-

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[1] *See* American Federated Life Ins. Co. v. Dale, 701 So. 2d 809, 812 (Miss. 1997) (holding that regulation was invalid because it was inconsistent with statute limiting rates insurance company may charge for credit life insurance).

[2] *See* Perry v. Nationwide Gen. Ins. Co., 700 So. 2d 600, 601 (Miss. 1997) (holding that city's plan of self-insurance was not liability insurance for purposes of Uninsured Motorist Statute).

[3] Murriel v. Alfa Ins. Co., 697 So. 2d 370, 372 (Miss. 1997) (holding that carrier may waive defense of consent if it does not respond within reasonable time to request for consent).

[4] McCord v. Gulf Guar. Life Ins. Co., 698 So. 2d 89, 92 (Miss. 1997) (holding that in order to raise concealment defense, carrier must show by clear and convincing evidence that misstatements of fact were "material at the time asked").

ute,[5] and bad faith.[6]

I. Bad Faith Claims

A. Arguable Basis Defined

In *State Farm Automobile Insurance Co. v. Grimes*,[7] the supreme court resolved a potential conflict which existed in previous Mississippi bad faith decisions.[8] The supreme court clarified the legal standard for punitive damages under a bad faith claim.[9] Additionally, the supreme court distinguished and affirmed the existence of a third tier of damages for bad faith claims.[10]

On July 22, 1991, Earl Grimes filed a theft claim on his 1969 Corvette with his auto insurance company, State Farm.[11] Subsequently, State Farm conducted an investigation

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[5] American Funeral Assurance Co. v. Hubbs, 700 So. 2d 283, 285-86 (Miss. 1997) (holding that punitive damages claim for bad faith denial was not governed by punitive damages statute found at Miss. Code Ann. § 11-1-65 (1972)).

[6] Murphree v. Federal Ins. Co., No. 94-CA-00669-SCT, 1997 WL 167002, at *13 (Miss. April 10, 1997) (holding that directors and officers insurance carrier had arguable reason for delaying indemnity payment where policy supported carrier's position).

[7] No. 95-CA-00918-SCT, 1997 WL 746006 (Miss. Dec. 4, 1997).

[8] *Grimes*, 1997 WL 746006, at *4-5. The court recognized that its opinion in Universal Life Ins. Co. v. Veasley, 610 So. 2d 290 (Miss. 1992), was inconsistent with other decisions addressing bad faith. *Id.* at *4. *Compare* State Farm Fire & Cas. Co. v. Simpson, 477 So. 2d 242, 250 (Miss. 1985) (holding that lack of arguable basis existed only where insurer's action rose to level of independent tort); *with* Universal Life Ins. Co. v. Veasley, 610 So. 2d 290, 294 (Miss. 1992) (concluding that inadvertent calculation in handling claim was insufficient arguable basis for denying claim).

[9] *Grimes*, 1997 WL 746006, at *7. The court held that the submission of the issue of punitive damages to the jury was only proper when an insurance carrier lacked an arguable basis for denying a claim and the carrier acted with "malice or gross negligence or reckless disregard for the rights of others." *Id.*

[10] *Id.* at *4. The court stated, "It would clearly be against public policy to promote the unreasonable denial of insurance claims, even if the denials are not the product of gross negligence or a reckless disregard for the rights of the insured." *Id.*

[11] *Id.* at *1. Police recovered Grimes' car the same day he reported it stolen, just a few blocks away from his residence. *Id.* Notably, the exterior of Grimes' vehicle was not damaged; however, several items were removed from the vehicle. *Id.*

into the theft and concluded that Grimes' claim was fraudulent.[12] On November 11, 1991, State Farm formally notified Grimes that they were denying his claim.[13] On December 30, 1991, Grimes filed suit in the Circuit Court of Hinds County against State Farm, seeking both compensatory and punitive damages.[14] The jury awarded Grimes a verdict of $1,900 in contractual damages and $1,250,000 in punitive damages.[15] State Farm appealed this decision to the Mississippi Supreme Court.[16]

On appeal, State Farm argued that the trial court should not have presented the issue of punitive damages to the jury because they had an arguable reason[17] for denying Grimes' theft claim.[18] The supreme court stated that under Mississip-

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[12] *Id.* State Farm's investigation included three separate examinations of Grimes under oath, a physical examination of the automobile, and a review of Grimes' financial records. *Id.*

[13] *Id.* State Farm reasoned that the evidence suggested that Grimes had the motive and opportunity to steal his own vehicle in order to defraud State Farm. *Id.*

[14] *Grimes*, 1997 WL 746006, at *1. Grimes' complaint also sought attorney fees. *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at *2. State Farm argued that there was substantial evidence that Grimes' claim was fraudulent. *Id.* at *5. This evidence included *inter alia*: Grimes' car had mysteriously disappeared, the car demonstrated no signs of forced entry, the car was in unusually good condition after the theft, Grimes delayed reporting the theft to the police for two hours after he discovered it was missing, the "word on the street" indicated that the theft was an inside job, Grimes had financial motive, Grimes was adept in trading engines, the stolen parts and damage to the car were both inconsistent with a normal theft, Grimes had already collected on a vandalism claim, Grimes previously made inconsistent statements, Grimes was a mechanic, and the car was recovered in an unusual location. *Id.* at *1, *5.

[18] *Id.* at *2-3. State Farm also argued that the trial court's refusal to grant Grimes' motion for directed verdict as to contractual damages in itself prohibited a jury instruction as to punitive damages. *Id.* at *2. The supreme court rejected this argument and held instead that a "strict rule of law which held the denial of a directed verdict motion to be inconsistent with the submission of a punitive damage instruction" to the jury was unsound. *Id.* at *3. *See* Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1185 (Miss. 1990) (holding trial court's refusal to grant directed verdict for plaintiff as to underlying claim for contractual damages did not per se prohibit submission of punitive damage instruction to jury).

pi law, a trial court should only submit the issue of punitive damages to the jury when 1) the insurer lacked an arguable or legitimate basis for denying the claim, and 2) the insurer committed a willful or malicious wrong, or acted with gross and reckless disregard for the insured's rights.[19] However, the supreme court also stated that its decision in *Universal Life Insurance Co. v. Veasley*, provided a third tier of damages for negligent denial of claims.[20] The supreme court recognized that in order to safeguard both principles of actual and punitive damages, it was paramount that it clarify the definition of "arguable or legitimate basis."[21] The supreme court held that the denial of a claim was not "arguable" when it was "unsupported by evidence which is sufficiently credible as to lead a reasonable insurer to deny coverage."[22]

When applying this standard to Grimes' claim, the court held that a reasonable jury could have found that State Farm lacked an arguable basis for denying Grimes' theft claim.[23] However, the supreme court reversed the verdict of the trial court and held that State Farm's conduct did not justify an

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[19] *Grimes*, 1997 WL 746006, at *3. *See* Life & Cas. Ins. Co. v. Bristow, 529 So. 2d 620, 624 (Miss. 1988) (holding punitive damages award requires two-part analysis); Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 248 (Miss. 1977) (holding that punitive damages were improper where insurance carrier's denial of claim was justified by arguable basis).

[20] *Grimes*, 1997 WL 746006, at *4. The supreme court reasoned that a third category of damages, beyond contractual damages, were necessary to prevent the unreasonable denial of claims which were negligent, but were denied for an arguable reason. *Id.*; *see Veasley*, 610 So. 2d at 295 (holding that in life insurance case, damages for mental suffering were foreseeable and therefore recoverable).

[21] *Grimes*, 1997 WL 746006, at *3. The court noted that the term "arguable basis" is used to determine both types of damages. *Id.*

[22] *Id.* The supreme court reasoned that the "reasonable denial" standard was necessary to protect an insured from incurring expenses to obtain benefits that a reasonable insurer should have paid the insured initially. *Id.*

[23] *Id.* at *6. The supreme court reasoned that although Grimes' claim presented a close issue, State Farm's denial was entirely circumstantial and was made without any direct evidence. *Id.* The supreme court stated that although "a jury could have validly concluded that, absent some direct evidence that Grimes had committed the fraud in question, a denial of the claim was not sufficiently supported by credible evidence as to lead a reasonable insurer to deny a claim." *Id.* at *7.

award of punitive damages.[24]

B. Assignment of a Bad Faith Claim for Punitive Damages

In *Kaplan v. Harco National Insurance Co.*,[25] the Mississippi Supreme Court addressed the issues of whether a bad faith claim was assignable, and whether upon assignment of such a claim the assignee may seek punitive damages. On February 13, 1992, Eva Kaplan was involved in an automobile accident with Russell Peters.[26] At the time of the accident Peters was an employee of Paradise Trucking, which was insured by Harco.[27] In March of 1992, Kaplan's attorney contacted Paradise concerning her claim, and Paradise subsequently referred Kaplan's claim to Harco.[28] On October 13, 1992, the trial court entered a default judgment against Peters and Paradise in the amount of $35,000.[29] Subsequently, Kaplan filed a writ of garnishment against Harco.[30] Harco responded by denying liability coverage as to either Peters or Paradise.[31] After obtaining an assignment from both Peters

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[24] *Id.* The supreme court reasoned that State Farm's actions in denying Grimes' claim did not rise to the level of malice, gross negligence, or reckless disregard for the rights of the insured. *Id.* The supreme court noted that its decision may have been different if State Farm had conducted an inadequate investigation. *Id.*; *see also* Life & Cas. Ins. Co. of Tenn. v. Bristow, 529 So. 2d 620, 623 (Miss. 1988) (holding that insurance company has affirmative duty to thoroughly and promptly investigate claims).

[25] No. 95-CA-01154-COA, 1997 WL 771225 (Miss. Dec. 16, 1997).

[26] *Kaplan*, 1997 WL 771225, at *1.

[27] *Id.* At the time of the accident, Peters was driving his tractor and towing a trailer owned by Paradise Trucking and insured by Harco. *Id.*

[28] *Id.* On several occasions Harco's agent assured Peters that Harco would take care of the suit. *Id.* However, Harco failed to respond to Kaplan's complaint, and neglected to handle the file altogether. *Id.*

[29] *Id.* The default judgment also provided for interest and costs. *Id.*

[30] *Id.* Kaplan's attempts to collect on the default judgment through correspondence were unsuccessful. *Id.*

[31] *Kaplan*, 1997 WL 771225, at *1. The basis for Harco's denial of coverage as to Peters and Paradise was erroneous due to the existence of an MCS-90 endorsement. *Id.* The MCS-90 endorsement statutorily broadens the scope of an insurance carrier's liability by restricting the effect of certain policy limitations and conditions. *Id.* at *2.

and Paradise as to all claims against Harco, Kaplan filed suit against Harco on December 15, 1993.[32] The trial court granted summary judgment in favor of Harco,[33] and Kaplan appealed this finding to the Mississippi Supreme Court.[34]

First, the supreme court held that a claim for bad faith was assignable.[35] The supreme court reasoned that the Mississippi Legislature[36] had granted any assignee the right to sue in their own name for a chose in action.[37] Second, the supreme court held that a claim for punitive damages[38] was assignable to any party "affected" by the bad faith of an insurance carrier.[39] The supreme court reasoned that allowing the assignment of such a claim was consistent with Mississippi jurisprudence[40] The supreme court also reasoned that allow-

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[32] *Id.* at *2. Kaplan's amended complaint included a direct action against Harco. *Id.* Harco satisfied Kaplan's default judgment, but moved for summary judgment as to Kaplan's bad faith claim. *Id.*

[33] *Id.* The trial court held that Kaplan did not have standing to pursue a direct action against Harco. *Id.* The trial court also held that an action for punitive damages for bad faith was not assignable. *Id.*

[34] *Id.* The supreme court addressed Kaplan's appeal de novo. *Id.*

[35] *Id.* at *4. The supreme court held that a bad faith claim was a chose in action, and was therefore assignable. *Id.*

[36] *Kaplan*, 1997 WL 771225, at *3. *See* MISS. CODE ANN. § 11-7-3 (1972) (stating "assignee of a chose in action may sue for and recover on the same in his own name, if the assignment be in writing.").

[37] *Kaplan*, 1997 WL 771225, at *3-4. The court also reasoned that the majority of other jurisdictions recognized the assignment of claims in excess of contractual damages. *See, e.g.* Terrell v. Western Cas. & Sur. Co., 427 S.W.2d 825, 827 (Ky. 1968) (allowing assignment of cause of action for breach of contract and damages flowing therefrom). *But see* Dillingham v. Tri-State Ins. Co., 381 S.W.2d 914, 917-18 (Tenn. 1964) (rejecting assignment of punitive damages claim).

[38] *Kaplan*, 1997 WL 771225, at *8. The supreme court noted that the recovery of punitive damages was a remedy and not a cause of action. *Id.* at *7.

[39] *Id.* at *7. The supreme court held that Harco's bad faith had affected Kaplan in that it had impeded her ability to execute the default judgment against Peters and Paradise. *Id.*

[40] *Id.* The supreme court stated that a "claim for exemplary damages [was] akin to a statutory penalty, and that a branch of state government competent to authorize penalties—the judiciary instead of the legislature—[had] done so in this category of cases." *Id.* The court analogized its allowing Kaplan to recover punitive damages from Harco with a previous decision recognizing the assignability of statutory damages. *Id.*; *see* Fry v. Layton, 2 So. 2d 561, 565 (Miss. 1941) (holding that collection of statutory damages under Mississippi's usury act was limited to

ing the assignment of a punitive damage claim was consistent with public policy.[41] The supreme court concluded that a reasonable jury could have found that Harco's conduct justified an award of punitive damages.[42]

II. Uninsured Motorist Coverage

A. Aggregation

In *Box v. State Farm Mutual Automobile Insurance Co.*,[43] the Mississippi Supreme Court addressed the issue of whether a passenger may stack the separate uninsured motorist policies issued to the vehicle owner.[44] On October 12, 1986, Misty Jo Box, a passenger in Barry Williams' automobile, was injured in an accident involving Williams and Cora Baker.[45] Williams maintained three separate insurance policies through State Farm on his three vehicles, with individual UM limits of $100,000 on each vehicle.[46] Baker carried a liability policy with limits of $10,000, and Box had uninsured motorist coverage totaling $30,000.[47]

On November 15, 1989, Box filed suit against State Farm,

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individuals "who are parties to the contract, their privies in blood or estate, or those who would be *affected* by the usurious transaction . . . ") (emphasis added).

[41] *Kaplan*, 1997 WL 771225, at *7. The supreme court refused to condition the ability of an assignee to sue for punitive damages on the existence of a contractual relationship with the bad faith insurer. *Id.* at *8. The court stated, "we find that the public policy goal of punitive damages is better served by allowing the injured person whose claim potentially has been egregiously complicated by the insurance company's actions to be assigned the punitive damage claim." *Id.*

[42] *Id.* at *8. The court reasoned that Harco had failed to defend or investigate Kaplan's claim. *Id.*

[43] 692 So. 2d 54 (Miss. 1997).

[44] *Box*, 692 So. 2d at 54-55. Specifically, the court addressed whether Box, a Class 2 insured, was able to stack the separate UM policies purchased by Williams' household on its automobiles. *Id.*

[45] *Id.* at 55. The trial court concluded that Baker's negligence was the sole proximate cause of the accident, and this issue was not before the supreme court on review. *Id.*

[46] *Id.* State Farm, Williams' carrier, paid Box a total of $90,000, an amount calculated by offsetting Baker's limit of liability ($10,000) from Williams UM coverage on the vehicle involved in the accident ($100,000). *Id.*

[47] *Id.*

seeking to aggregate the uninsured motorist coverage on each of Williams' vehicles, thus raising her total fund from State Farm to $300,000.[48] Having paid Box the limit of uninsured motorist coverage on the vehicle in which she was a passenger, State Farm moved for summary judgment.[49] In its motion, State Farm maintained that under Williams' policy, Box was not an insured except as to the car involved in the accident.[50] Box contended that State Farm was circumventing the spirit of uninsured motorist jurisprudence[51] by issuing to households nominally separate policies on individual vehicles, while treating those same policies collectively.[52] The trial court granted State Farm's motion for summary judgment, and Box appealed to the Mississippi Supreme Court.[53]

On appeal, the supreme court held that a Class II insured may only claim the uninsured motorist coverage available through the insurance policy issued on the host vehicle.[54] The

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[48] *Id.*

[49] *Box*, 692 So. 2d at 55.

[50] *Id.* State Farm declined to pay the $200,000 of uninsured motorist coverage Williams carried on his other two vehicles. *Id.*

[51] *Id.* at 56. Box argued that State Farm's policy structure was set up to specifically avoid Mississippi's system of aggregation. *Id.*; *see* Wickline v. USF&G, 530 So. 2d 708, 712 (Miss. 1988) (stating that purpose of UM statute is to place injured party in same position as if negligent party were fully insured); Brown v. Maryland Cas. Co., 521 So. 2d 854, 857 (Miss. 1987) (holding that Class 2 insured may stack UM coverages of host vehicle).

[52] *Box*, 692 So. 2d at 55. Box cited a number of State Farm practices which indicated that, while several individual policies were issued to members of the same household, State Farm treated those policies as though they were one fleet policy. *Id.* State Farm applied multi-car discounts to those individual policies where a household insured multiple vehicles with State Farm. *Id.* Similarly, State Farm applied other types of discounts to household policies normally associated with individual drivers. *Id.* at 57. For drivers with DUI convictions, State Farm applied a surcharge to the highest rated vehicle in the household, despite the fact that the vehicles in the household were insured under separate policies. *Id.*

[53] *Id.* at 54. The trial court entered the order without issuing a written opinion. *Id.*

[54] *Id.* at 57. The court applied the earlier decision of *State Farm Mut. Auto. Ins. Co. v. Davis*, 613 So. 2d 1179 (Miss. 1992), which held that, where a household is issued separate policies, passengers in host vehicles may only draw upon the UM fund created by the vehicle involved in the accident. *Id. Cf.* Wickline v. USF&G, 530 So. 2d 708, 715 (Miss. 1988) (holding that passenger may stack host vehicle's UM coverage where host vehicle was insured as part of fleet policy).

supreme court reasoned that in order to receive benefits from a policy, a person must first qualify as an insured either under the language of the policy or under the language of the uninsured motorist statute.[55] However, the court found that, with respect to Williams' vehicles not involved in the accident, Box was not an insured under either classification.[56] The supreme court concluded that Box could not aggregate the uninsured motorist coverage Williams carried on his other vehicles.[57]

In *United States Fidelity & Guaranty Co. v. Ferguson*,[58] the supreme court resolved the issue of whether an insurance company could contractually prohibit the aggregation of uninsured motorist coverage.[59] On July 18, 1993, Dorothy Ferguson, a passenger in her own vehicle, was injured in a collision with Marzee Sipes, an underinsured driver.[60] Ferguson maintained $25,000 of uninsured motorist coverage with USF&G on each of her three vehicles.[61] Ferguson sought to aggregate the coverages on her vehicles; however, USF&G refused this demand under a provision in Ferguson's policy

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[55] *Box*, 692 So. 2d at 57. *See* Mississippi Farm Bureau Cas. Ins. Co. v. Curtis, 678 So. 2d 983, 987-88 (Miss. 1996) (holding friend of named insured was not insured under policies on named insured's other vehicles not involved in accident); Johnson v. Preferred Risk Auto. Ins. Co., 659 So. 2d 866, 871 (Miss. 1995) (holding family members temporarily visiting household were not members of household and were not insured as to family's other vehicles not involved in accident).

[56] *Box*, 692 So. 2d at 57-58. The court examined both the statutory definition and State Farm's policy definition of the term "insured." *Id.* Noting the restrictive language of the UM statute, the supreme court reasoned that the legislature never intended to define "insured" so broadly as to include a person in Box's position. *Id.* at 58. The court further noted that, according to State Farm's policy definitions, Box qualified as an insured only as to the vehicle she was occupying at the time of the accident. *Id.* at 57.

[57] *Id.* at 58. The supreme court upheld the trial court's decision granting State Farm's motion for summary judgment. *Id.*

[58] 698 So. 2d 77 (Miss. 1997); *see also* Paige Craig, Note, *Automobile Insurance—Uninsured Motorists—Public Policy Demands that Anti-Stacking Provisions be Held Void as Against Public Policy*, 67 MISS. L.J. 585 (1997).

[59] *Ferguson*, 698 So. 2d at 80.

[60] *Id.* at 78. Ferguson maintained $25,000 of UM coverage on each of her three vehicles. *Id.* The negligent driver had $25,000 in liability insurance. *Id.*

[61] *Id.* The court did not address whether Ferguson's policies with USF&G were issued separately. *Id.*

which precluded stacking.[62] On February 4, 1994, Ferguson filed suit against USF&G, seeking a declaratory judgment affirming her right to aggregate her uninsured motorist policies.[63]

The supreme court held that USF&G's anti-stacking clause was against public policy and, therefore, unenforceable.[64] The supreme court reasoned that insurance contracts are contracts of adhesion.[65] After examining the language of the uninsured motorist statute,[66] the supreme court determined that the Mississippi Legislature did not intend to restrict an insured's ability to aggregate multiple uninsured motorist policies.[67]

B. Offset

In *Fidelity & Guaranty Underwriters, Inc. v. Earnest*,[68] the Mississippi Supreme Court clarified an insurance carrier's ability to offset liability payments made on behalf of a negligent defendant against its obligation to pay uninsured motorist benefits.[69] On September 11, 1989, Tracy Earnest was killed in a single car accident as a result of the negligent driving of Charles Plunkett.[70] Plunkett maintained a liability

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[62] *Id.* Initially, Ferguson attempted to resolve the matter through correspondence, offering to accept $52,000 as a settlement of her claim against USF&G. *Id.* USF&G offered to pay Ferguson the statutory minimum of $10,000 for each of her vehicles, totaling $30,000. *Id.* USF&G then offset the $25,000 paid by the negligent driver's carrier, leaving Ferguson with a $5,000 UM recovery. *Id.*

[63] *Id.*

[64] *Id.* at 79. The court stated that an insured may stack "regardless of the number or amount of the premium(s) paid for UM coverage." *Id.*

[65] *Id.* at 80. The court recognized that insurance contracts are highly standardized throughout the industry. *Id.*

[66] MISS. CODE ANN. § 83-11-101 (1972).

[67] *Ferguson*, 698 So. 2d at 81. USF&G argued that to allow stacking of UM would sometimes allow a recovery greater than the limit of liability, and that this result was in direct defiance of MISS. CODE ANN. § 83-11-101(1), which limited UM limits to no more than the limit of liability coverage. *Id.*

[68] 699 So. 2d 585 (Miss. 1997).

[69] *Earnest*, 699 So. 2d at 589.

[70] *Id.* at 586. Two other passengers died in the accident, but Plunkett did not qualify as uninsured motorist as to them. *Id.*

policy with Fidelity & Guaranty (F&G), with policy limits of $50,000 in liability coverage and $25,000 in uninsured motorist coverage.[71] Exclusive of Plunkett's insurance with F&G, Earnest maintained a separate policy through State Farm, with $45,000 in uninsured motorist coverage.[72]

John Earnest, Tracy Earnest's father, filed suit against State Farm and F&G.[73] The trial court held that State Farm's total liability to Earnest was $20,000 in uninsured motorist benefits.[74] The trial court also held that F&G was responsible for the entire $25,000 in uninsured motorist coverage, but allowed F&G to claim an offset of $16,666.67, a figure equivalent to the amount it paid Earnest under Plunkett's liability policy.[75] Both F&G and Earnest appealed the trial court's decision to the Mississippi Supreme Court.[76]

On appeal, F&G argued that it was entitled to an offset equal to the sum of the liability payments it made on behalf of Plunkett against any uninsured motorist funds it might owe.[77] Earnest argued that F&G was precluded from an offset altogether.[78] The supreme court held that F&G was entitled to an offset, but only to the extent of F&G's liability pay-

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[71] *Id.*

[72] *Id.* State Farm acknowledged liability to Earnest for $20,000 and tendered this amount to the trial court, implying that State Farm was offsetting its own liability with funds available under Plunkett's policy with F&G. *Id.*

[73] *Id.* As a passenger in the vehicle, Earnest was a Class II insured as to that particular vehicle and as such, was entitled to the UM coverage available on the vehicle. *Id.*

[74] *Id.* at 585.

[75] *Earnest*, 699 So. 2d at 586.

[76] *Id.* F&G contended that its liability to Earnest was limited to $16,666.67, the amount it paid under its liability coverage. *Id.* Earnest filed a cross-appeal which claimed that F&G was responsible to him for the full $25,000 of uninsured motorist coverage. *Id.* State Farm reached a settlement with Earnest, and accordingly, Earnest's appeal was dismissed with regard to State Farm. *Id.*

[77] *Id.* F&G argued that its policy language did not limit the amount of its offset to liability payments made to the UM insured. *Id.* at 587.

[78] *Id.* at 587-88. The supreme court dismissed this argument reasoning that Earnest's argument was in direct contradiction to established precedent. *Id.*; *see* State Farm Mut. Auto. Ins. Co. v. Kuehling, 475 So. 2d 1159, 1163 (Miss. 1985) (holding insurance company was entitled to offset uninsured motorist coverage by amount of settlement paid by tortfeasor's carrier).

ments made to Earnest.[79] The supreme court reasoned that allowing F&G to offset the amount it paid to third parties under its liability coverage would unjustifiably reduce the minimum uninsured motorist coverage required by statute.[80] The supreme court further reasoned that the plain meaning of Mississippi's Uninsured Motorist Statute[81] did not support such a broad application of offsetting.[82] The supreme court affirmed the trial court's ruling, rejecting the arguments of both F&G and Earnest.[83] Once a driver has been deemed uninsured with respect to another person, the limit of recovery is calculated based on the amount of liability coverage actually paid to the beneficiary of the UM coverage.[84]

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[79] *Earnest*, 699 So. 2d at 587-88. The court rejected F&G's expansive reading of the right of offset. *Id.*

[80] *Id.* at 588-89. *See* Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658, 664 (Miss. 1994) (disallowing offset for Workers Compensation benefits); *see also* Talbot v. State Farm Auto. Ins. Co., 291 So. 2d 699, 702-03 (Miss. 1974) (disallowing offset for payments under medical insurance policy); *cf.* Dixie Ins. Co. v. State Farm Auto Ins. Co., 614 So. 2d 918, 922 (Miss. 1992) (considering policy language in determining scope of offset).

[81] MISS. CODE ANN. § 83-11-103 (1972). The court recognized that, unlike the statutes of other jurisdictions, Mississippi's uninsured motorist statute does not provide a right of offset. *Earnest*, 699 So. 2d at 592.

[82] *Id.* at 590-91. The supreme court noted that it "consistently interpreted and construed the UM statutes from the perspective of the insured with an awareness of the public policy considerations which undergird our UM scheme." *Id.*; *see supra* note 73.

[83] *Earnest*, 699 So. 2d at 590-91. The court stated that F&G "properly offset its $25,000 UM limits applicable to Earnest by the $16,666.67 in liability payments made to the insured, for a total liability of $8,333.33 in UM benefits." *Id.* at 592. It should be noted that the supreme court stated "that the trial court was in error in granting State Farm summary judgment following its tender of *only $20,000* in UM benefits." *Id.* at 592, n.6. (emphasis added)

[84] *Id.* at 592. F&G paid each of the three passengers $16,666.67, or one-third of Plunkett's $50,000 liability policy. *Id.* The court allowed F&G to offset this amount, thus allowing Earnest a UM recovery of $8,333.33. *Id.* The limits versus limits comparison is discarded in calculating recovery from the UM fund. *Id.* at 587.

III. Policy Interpretation

A. Motor Vehicle Defined

In *Dowdle v. Mississippi Farm Mutual Insurance Co.*, the Mississippi Supreme Court considered whether a golf cart was a motor vehicle under an uninsured motorist policy.[85] In *Dowdle*, the plaintiff, Archie Dowdle, Jr., was allegedly injured by the negligent driving of a golf cart by Jimmy Berryhill, Jr.[86] Dowdle filed a claim against Farm Bureau which alleged that he was entitled to uninsured motorist coverage.[87] Farm Bureau refused to pay the claim.[88]

The supreme court affirmed the trial court's decision and held that a golf cart was not an automobile under the terms of Farm Bureau's policy with Dowdle.[89] The supreme court reasoned that Farm Bureau's policy was "clear, unambiguous, and easily understood."[90] The supreme court also held that no relevant statutory authority included a golf cart in its definition of a vehicle.[91] The supreme court reasoned that a golf cart was not subject to licensing or insurance requirements,[92] and was not intended for use on public roads.[93] The Court

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[85] 697 So. 2d 788 (Miss. 1997).

[86] *Dowdle*, 697 So. 2d at 789.

[87] *Id.* Dowdle lived with his parents and was covered under his father's uninsured motorist coverage. *Id.*

[88] *Id.* Farm Bureau argued that a go-cart was not an automobile under its policy with Dowdle. *Id.* Farm Bureau's policy excluded from its uninsured motorist coverage "any all-terrain (ATV) motorized vehicle or motorcycle or farm type tractor or equipment designed for use principally off public roads." *Id.* Farm Bureau also argued that a golf cart did not fit the definition of an automobile under any relevant statutory source. *Id.*

[89] *Id.* at 791.

[90] *Id.* at 789. *See* Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381 (Miss. 1977) (holding that limits on uninsured motorist policy "must be done in such clear and unambiguous language that it may be readily seen and understood by the insured at the time coverage is limited").

[91] *Dowdle*, 697 So. 2d at 791.

[92] *Id.* at 790. *See* Wilcher v. Michigan Mut. Ins. Co., 691 F. Supp. 1019, 1021 (S.D. Miss. 1988) (holding that farm tractor was not vehicle for use on public roads because it was not subject to licensing or insurance requirements).

[93] *Dowdle*, 697 So. 2d at 790. The supreme court noted that in an unpublished opinion, *State Farm Mut. Auto. Ins. Co. v. Graham*, 3:92CV161-B-D (N.D.

also rejected a decision from another jurisdiction which held that a golf cart was a motor vehicle.[94]

B. Operator Under Uninsured Motorist Policy Defined

In *United Services Automobile Ass'n v. Shell*, the Mississippi Supreme Court considered whether a hitchhiker was an operator under an uninsured motorist policy.[95] On July 8, 1991, Aaron Shell, Jr., was shot and killed[96] by a hitchhiker, Murray Crawford.[97] On the evening of the murder Shell was operating his truck which was insured under an uninsured motorist policy with United States Automobile Association (USSA).[98] On November 6, 1992, Patricia Shell, the administratrix of Shell's estate, filed suit in the Chancery Court of Franklin County seeking damages for wrongful death under Shell's uninsured motorist policy with USSA.[99] On May 31, 1994, the chancellor entered a final decree and judgment for $250,000 in favor of Shell's estate.[100]

On appeal, the Mississippi Supreme Court reversed the lower court's decision and held that Crawford was not an operator of Shell's vehicle as contemplated by Shell's uninsured motorist policy[101] with USAA.[102] The supreme court

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Miss. 1994), that the district court held that a plaintiff who was struck by a dragster was not covered by an uninsured motorist policy, because the dragster was designed and used for off road purposes. *Id.*

[94] *Dowdle*, 598 So. 2d at 791. *See* Coffey v. State Farm Mut. Auto. Ins. Co., 412 N.W.2d 281, 282 (Mich. Ct. App. 1987) (holding go-cart was motor vehicle for purpose of no-fault insurance statute).

[95] 698 So. 2d 96 (Miss. 1997).

[96] *Shell*, 698 So. 2d at 96. It is undisputed that Crawford never operated Shell's truck until after the murder. *Id.* at 97. There is also no evidence Crawford murdered Shell in order to gain control of Shell's truck. *Id.*

[97] *Id.* at 96. Shell had picked Crawford up along the highway. *Id.* Crawford held Shell at gunpoint, forced him to drive off the main road, and later murdered him. *Id.* at 96-97.

[98] *Id.* at 97.

[99] *Id.* USSA initially requested a transfer to circuit court for a jury trial, but later consented to jurisdiction in chancery court. *Id.*

[100] *Id.*

[101] *Shell*, 698 So. 2d at 97-98. Under the terms of the USAA policy, the Shell

rejected the Shell estate's theory that Crawford was the operator of Shell's truck because he had effective control of its operation.[103] The supreme court also reasoned that the principle authority which the Shell estate had relied on in support of the theory that Crawford was an operator, was inapplicable.[104]

C. Advertising Injury Defined

In *Delta Pride Catfish, Inc. v. Home Insurance Co.*,[105] the Mississippi Supreme Court considered the definition of an "advertising injury" under a comprehensive general liability policy. In *Delta Pride*, the appellant, Delta Pride, was sued for alleged price fixing in three separate class actions.[106] On

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estate had to prove: "(1) that Murray Crawford was the 'owner or operator' of an uninsured vehicle at the time of Shell's injuries; (2) that the death of Aaron Shell, Jr. was 'caused by an accident;' and (3) that the liability for the damages arising out of Shell's death arose 'out of the ownership, maintenance or use of the uninsured motorist vehicle.'" *Id.* Because the supreme court determined that USAA's policy was more inclusive than Mississippi's uninsured motorist statute, it was unnecessary for the court to address whether Crawford was an "operator" under Mississippi's statutory scheme. *Id.* at 98.

[102] *Id.* at 100-01. The supreme court noted that the issue of whether Crawford was an operator would determine whether Shell's estate could recover on the USAA policy. *Id.* at 98. However, the supreme court's decision also suggests that it would have held that Shell's death did not arise out of the ownership, maintenance, or use of his truck. *Id.* at 100. *See* Spradlin v. State Farm Mut. Auto. Ins. Co., 650 So. 2d 1383, 1386 (Miss. 1995) (stating that previous cases have held "that a shooting of an insured driver by an uninsured motorist did not arise out of the ownership, maintenance or use of that vehicle and therefore did not fall under the UM coverage of the insurance policies"); *see also* Roberts v. Grisham, 487 So. 2d 836, 839 (Miss. 1986) (holding that shooting was intervening cause that prevented liability arising out of use of vehicle).

[103] *Shell*, 698 So. 2d at 98. The supreme court reasoned that the Shell estate had improperly relied on a definition for operate which was derived from a treatise discussing "Automobiles and Highway Traffic." *Id.* at 98-99. The court held that the proper analysis focused on the definitions from the Mutual Casualty Insurance treatise on "Automobile Insurance". *Id.* at 99.

[104] *Id.* at 99-100. The Shell estate cited *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Mitchell,* which held that an assailant who seized a vehicle before killing the insured was the operator of the vehicle. *Id.* at 99 (citing Alabama Farm Bureau Mut. Cas. Ins. Co. v. Mitchell, 373 So. 2d 1129 (Ala. Civ. App. 1979)).

[105] 697 So. 2d 400 (Miss. 1997).

[106] *Delta Pride,* 697 So. 2d at 402. The underlying suits against Delta Pride

March 30, 1994, Delta Pride filed a complaint in the Chancery Court of Sunflower County against its general liability insurer, Home Insurance Company (Home),[107] which alleged that Home had a duty to defend and indemnify Delta Pride in the suits.[108] On December 29, 1994, the chancellor granted Home's motion for summary judgment and dismissed Delta Pride's claim.[109] Subsequently, Delta Pride appealed this finding to the Mississippi Supreme Court.[110]

On appeal, Delta Pride contended that written responses,[111] which it had made to plaintiffs prior to their filing suits, constituted advertising injuries under the terms of its policy with Home.[112] The supreme court rejected this contention and affirmed the lower court's decision.[113] The supreme court first held that the evidence did not show "widespread promotional activities directed to the public at large by Delta Pride."[114] The supreme court also held that an "advertising injury" must be causally connected to advertising activity.[115] The court reasoned that imposing a causal requirement prevented an overly expansive application of the term "advertising injury."[116] The court also reasoned that it was against

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alleged that Delta Pride had unlawfully met with competitors to set minimum prices on catfish. *Id.* at 403.

[107] *Id.* at 402. Delta Pride also filed suit against several excess carriers. *Id.*

[108] *Id.* Delta Pride argued that Home was obligated by a clause in its comprehensive policy which covered "advertising injury." *Id.* Home's comprehensive policy defined "advertising injury" as an "injury . . . occurring in the course of the named insured's advertising activities, if such injury arises out of . . . unfair competition." *Id.*

[109] *Id.*

[110] *Id.*

[111] *Delta Pride,* 697 So. 2d at 404. Delta Pride argued that it had written three letters to plaintiffs which explained why the price of catfish had risen. *Id.*

[112] *Id.* Delta Pride maintained that the terms "advertising injury" and "unfair competition" were ambiguous, and therefore, should be construed in the favor of the insured. *Id.*

[113] *Id.* at 405.

[114] *Id.* at 404. The court indicated that Delta Pride's letters could not be construed as "advertising." *Id.*

[115] *Id.*

[116] *Delta Pride*, 697 So. 2d at 404. The supreme court warned that a broad use of the term "advertising injury" could apply to almost any business activity.

public policy to allow an insured to purchase insurance for an illegal act.[117]

D. Presumption in Favor of Permissive Use

In *State Farm Mutual Automobile Insurance Co. v. Eakins*,[118] the Mississippi Supreme Court considered whether the use of a vehicle by a non-owner raises a presumption of permissive use. In *Eakins*, the appellees filed suit against Christopher Jobe for his involvement as a driver in an automobile accident.[119] At trial, Jobe was represented by State Farm, Ronald Chester's[120] automobile liability carrier, who defended Jobe under a reservation of rights.[121] The appellees obtained a judgment against Jobe, which State Farm refused to satisfy.[122] Subsequently, the appellees filed a post-judgment garnishment action against State Farm.[123] The trial court held that State Farm was estopped from denying coverage and entered a judgment against State Farm.[124]

The Mississippi Supreme Court held that the trial court's application of the doctrine of estoppel was erroneous.[125] The supreme court reasoned that the garnishment action was State Farm's first opportunity to raise the issue of a coverage dispute.[126] The supreme court also held that there is a pre-

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Id. However, the supreme court stated that actions for defamation, libel, slander, invasion of privacy, and copyright infringements were all injuries which may be causally connected to advertising activities. *Id.*

[117] *Id.* at 405.

[118] No. 96-CA-00034-COA, 1997 WL 771222 (Miss. Dec. 16, 1997).

[119] *Eakins*, 1997 WL 771222, at *1.

[120] *Id.* The vehicle Jobe was driving was owned by Ronald Chester. *Id.*

[121] *Id.* State Farm represented Jobe under a reservation of rights because there was evidence that Jobe had stolen Chester's automobile, and therefore, was not an insured under its policy. *Id.* at *3.

[122] *Id.* at *1.

[123] *Id.*

[124] *Eakins*, 1997 WL 771222, at *1. The garnishment trial court reasoned that State Farm's failure to mention its justification for denying coverage at the preceding trial estopped State Farm from raising that issue at the garnishment proceeding. *Id.* at *2-3.

[125] *Id.* at *3.

[126] *Id.* The court reasoned that if State Farm had raised coverage issues at the

sumption in favor of finding that non-owners' use of a vehicle was permissive, in the absence of any contrary evidence.[127] The supreme court reasoned that such an approach was the most appropriate procedural method.[128] The supreme court affirmed the trial court's decision and concluded that State Farm had failed to provide any evidence[129] which would establish that Jobe's use of Chester's vehicle was unpermissive.[130]

IV. Doctrine of Equitable Lien

In *General Star Indemnity Co. v. Pike County National Bank*,[131] the supreme court addressed the equitable lien doctrine. In an insurance context, the equitable lien doctrine provides a mortgagee equitable protection where the mortgagor, in contradiction of its agreement with the mortgagee, fails to purchase insurance for the protection of the mortgagee or fails to include the mortgagee as a loss payee.[132] On December 4, 1989, Pike County National Bank (PCNB) loaned Wendell and Julia Blount $250,075, and in return, the

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underlying trial, it would have violated its duty to Jobe. *Id.* The court also reasoned that State Farm did not have standing to raise the issue of coverage at the underlying trial because State Farm was not a party to the action. *Id.*

[127] *Id.* at *5. The court noted that as a practical matter, a presumption that the use of a vehicle by a non-owner is permissive will not have any real effect unless there is little or no evidence regarding the use of a vehicle. *Id.*

[128] *Id.* The court reasoned that a presumption in favor of permissive use would prevent insurance carriers from confounding a judgment creditor's collection attempts by merely claiming that an insured's use of a vehicle was unpermissive. *Id.*

[129] *Eakins,* 1997 WL 771222, at *6. It is unclear why neither the appellees nor State Farm offered any evidence as to whether Jobe's use of Chester's automobile was permissive. *Id.* at *4-*5.

[130] *Id.* at *6. The supreme court stated that the trial court's decision had reached the "right result," although for the wrong reason. *Id.*

[131] No. 94-CA-01169-SCT, 1997 WL 590147 (Miss. Sept. 25, 1997).

[132] *General Star*, 1997 WL 590147, at * 1. *See* McGory v. Allstate Ins. Co., 527 So. 2d 632, 639-40 (Miss. 1988) (holding where mortgagor failed to name mortgagee as loss payee, mortgagee possessed equitable lien on insurance proceeds); Lititz Mut. Ins. Co. v. Miller, 50 So. 2d 221, 225 (Miss. 1951) (stating that Mississippi law presumed existence of mortgagee's equitable lien where agreement to insure existed).

Blounts granted PCNB a deed of trust on their property.[133] The deed of trust contained a provision requiring the Blounts to maintain insurance on the property, but the Blounts later quitclaimed their interest in the property to LCD Corporation (LCD) and let the insurance on the property lapse.[134] LCD later purchased insurance on the property from General Star Indemnity, but the policy made no mention of PCNB as a loss payee.[135]

Shortly after LCD purchased insurance on the property, a house on the property was completely destroyed by fire.[136] PCNB filed a proof of loss with General Star, but General Star denied PCNB's claim, arguing that there was no contractual relationship between LCD and PCNB.[137] PCNB subsequently filed suit against the Blounts and General Star seeking payment of the insurance proceeds, a clarification of its priority status, and an award of punitive damages for bad faith denial.[138] The trial court awarded PCNB an amount equal to the principal and interest which had accrued on its note but refused to award punitive damages.[139]

General Star appealed this decision to the Mississippi Supreme Court, claiming that the trial court misused the equitable lien doctrine by applying it in favor of PCNB, which

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[133] *General Star*, 1997 WL 590147, at *1. The Blounts filed a petition for bankruptcy in 1991, and during these proceedings, PCNB sued to have the quitclaim deed set aside. *Id.*

[134] *Id.*

[135] *Id.* LCD purchased the insurance in response to a bankruptcy judge's order requiring the Blounts to reinstate their policy. *Id.*

[136] *Id.*

[137] *Id.* General Star argued that, in order for PCNB to have any interest in the proceeds payable to LCD, LCD must have first agreed to insure the property for PCNB's benefit. *Id. But see* Employers Mut. Cas. Co. v. Standard Drug Co., 234 So. 2d 330, 333 (Miss. 1970) (holding that constructive notice made by deed of trust was sufficient to establish equitable lien in favor of unnamed mortgagee).

[138] *General Star*, 1997 WL 590147, at *1. PCNB also named as a defendant the trustee to the deed of trust on the Blounts' property. *Id.*

[139] *Id.* The trial court awarded PCNB a total of $675,602.78, an amount representing $545,936.28 in principal and interest, $49,271.10 in expenses, $18,056.12 in attorney's fees incurred in a related Louisiana bankruptcy proceeding, and $62,549.28 in attorney's fees incurred in the Blounts' bankruptcy proceedings in Mississippi. *Id.*

was not a party to the insurance agreement.[140] The supreme court held that section 83-13-9 of the *Mississippi Code* provides an automatic loss payable clause in every fire policy procured to protect mortgaged property.[141] The supreme court also held that because the Blounts merely quitclaimed their interest in the property to LCD, LCD could not escape the obligations under the Blounts' mortgage; thus, LCD took the property subject to any encumbrances undertaken by the Blounts.[142] Based on the equitable lien doctrine, the supreme court affirmed the trial court's decision to award PCNB its claim for interest and principal on the note.[143]

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[140] *Id.* PCNB cross-appealed the trial court's denial of damages for General Star's bad faith denial. *Id.*

[141] *Id.* at *3. The court further stated, "that which the statute requires to be done will be regarded as having been done." *Id.* (citing United States v. Sentinel Fire Ins. Co., 178 F.2d 217, 228 (5th Cir. 1949)).

[142] *Id.*; *see* Rosenbaum v. McCaskey, 386 So. 2d 387, 389 (Miss. 1980) (holding that "quitclaim deed operates only as a conduit to pass the grantor's interest to the grantee"); 23 AM. JUR. 2D *Deeds* § 339 (1983) (stating that grantee can have no better title to land than grantor).

[143] *General Star*, 1997 WL 590147, at *4. The supreme court further held that because PCNB was not listed as a loss payee in LCD's insurance policy, General Star had a legitimate and arguable basis for its denial of PCNB's claim. *Id.* Therefore, the supreme court held that punitive damages were not appropriate. *Id.*

THE REPEALER: CONFLICTS IN EVIDENCE CREATED BY MISAPPLICATION OF MISSISSIPPI RULE OF EVIDENCE 1103.

I. INTRODUCTION

In Mississippi, the supreme court has assumed exclusive authority to promulgate rules of practice and procedure in Mississippi Courts.[1] The Mississippi Supreme Court exercised this power when it created the Mississippi Rules of Evidence in 1986.[2] Since their creation, several instances have occurred where evidentiary statutes and rules conflict.[3] When a conflict occurs, Mississippi Rule of Evidence 1103 (M.R.E. 1103) expressly states that the rule of evidence controls.[4] Despite the obvious intent of this rule, the Mississippi Supreme Court in certain instances has continued to apply evidentiary statutes that conflict with evidentiary rules.[5]

This comment will first provide a brief overview of the reasoning behind the supreme court's exclusive approach to rule-making authority. Second, this comment will address the application of M.R.E. 1103 in terms of conflicting evidentiary statutes and rules, identifying troubling conflicts that create gaps in evidentiary law for practitioners in the state. Finally, this comment will offer an approach to this problem that will eliminate the current inconsistencies and prevent problems of a similar nature from occurring in the future.

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[1] *See infra* notes 6-26 and accompanying text.
[2] *See infra* note 16 and accompanying text.
[3] *See infra* notes 30-69 and accompanying text.
[4] *See infra* notes 27-29 and accompanying text.
[5] *See infra* notes 30-69 and accompanying text.

II. JUDICIAL RULE-MAKING AUTHORITY[6]

Historically, the legislature played a major role in the creation of rules of procedure in Mississippi courts.[7] This process continued without much controversy until the Mississippi Supreme Court's 1975 decision in *Newell v. State*.[8] In *Newell*, the court declared unconstitutional, statutes that prohibited trial judges from instructing juries without a request by the parties.[9] In making this decision, the court relied on the "inherent power" granted by the Mississippi Constitution to the judiciary to create rules of procedure for the courts.[10]

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[6] For an in-depth analysis of the Mississippi Supreme Court's Rule-Making Authority see F. Keith Ball, *The Limits of the Mississippi Supreme Court's Rule-Making Authority*, 60 MISS. L.J. 359 (1990); William H. Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 MISS. C.L. REV. 1 (1982); Paul B. Herbert, *Process, Procedure and Constitutionalism: A Response to Professor Page*, 3 MISS. C.L. REV. 45 (1982); Lawrence J. Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287 (1972). *See also* Roscoe Pound, *The Rule-Making Power of the Court*, 12 A.B.A. J. 599 (1926).

[7] Ball, *supra* note 6, at 360 nn.3-4.

[8] 308 So. 2d 71 (Miss. 1975).

[9] *Newell,* 308 So. 2d at 74. Section 11-7-155 and section 99-17-35 of the Mississippi Code provided that judges "shall not sum up or comment on the testimony, or charge the jury as to the weight of the evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case." MISS. CODE ANN. §§ 11-7-155 (1993), 99-17-35 (1994).

[10] *Newell,* 308 So. 2d at 76. "The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts." *Id.* (citing Matthews v. State, 288 So. 2d 714 (Miss. 1974); Gulf Coast Drilling & Exploration Co. v. Permenter, 214 So. 2d 601 (Miss. 1968); and S. Pac. Lumber Co. v. Reynolds, 206 So. 2d 334 (Miss. 1968). Article VI, section 144 of the Mississippi Constitution provides that "[t]he judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this Constitution." *Id.* "Judicial power" as stated in section 144 has been interpreted to include "the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business." *S. Pac. Lumber Co.*, 206 So. 2d at 335. This authority "leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose." *Newell,* 308 So. 2d at 77. Article VI, section 146 of the Mississippi Constitution provides that "[t]he Supreme Court shall have such jurisdiction as properly belongs to a court of appeals and *shall exercise no jurisdiction on matters other than those specifically provided by this Constitution or by general law." Id.* (emphasis added). The legislature amend-

In response to *Newell*, the legislature enacted a statute that vested general rule-making power in the supreme court.[11] This statute, however, did not vest exclusive control of rule-making power with the supreme court. Instead, it created a system of concurrent authority between the legislature and the judiciary by establishing an advisory committee responsible for creating rules of judicial procedure.[12] Under this system, the final rules developed by the advisory committee were subject to veto by the state legislature.[13]

In 1979, the court submitted the proposed rules of civil procedure to the legislature.[14] The legislature rejected the proposed rules and discontinued funding to the advisory committee.[15] Despite the clear intent of the enabling legislation, the Mississippi Supreme Court adopted the proposed rules of civil procedure in 1981.[16] In response to the court's blatant disregard for the legislature's rule-making authority, the legis-

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ed section 146 after the court's decision in *Newell* in an effort to curtail the court's power to create rules of procedure. *See infra* note 17 and accompanying text. It is important to note that Article VI, section 90(s) of the Mississippi Constitution appears to explicitly grant the legislature authority to enact procedural rules: "[t]he legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.:. . . . (s) Regulating the practice in courts of justice." MISS. CONST. art. IV, § 90(s). *See also* Ball, *supra* note 6 (stating that Mississippi Supreme Court stands alone in exercising exclusive rule-making authority despite constitutional provision vesting such power with legislature). *See generally* Marshall v. State, 662 So. 2d 566, 576 (Miss. 1995) (Hawkins, C.J., dissenting) (stating that Mississippi Constitution does not grant court express authority to promulgate rules).

[11] 1975 Miss. Laws 501, 15-19 (codified at MISS. CODE ANN. §§ 9-3-61 to -69 (1991 & Supp. 1997)).

[12] MISS. CODE ANN. § 9-3-65 (1991 & Supp. 1997). The statute created an Advisory Committee consisting of judges and practicing attorneys which would be responsible for developing judicial rules of procedure. *Id.*

[13] *See* MISS. CODE ANN. § 93-3-71 (Supp. 1989) *repealed*. It is apparent that the supreme court had no such "veto power" in mind when writing the opinion in *Newell* as evidenced by the following passage: "[w]e hasten to say that as long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest . . . ." *Newell*, 308 So. 2d at 78.

[14] *See* Page, supra note 6 at 5.

[15] *See* Page, supra note 6 at 6.

[16] Order of May 26, 1981, 395-97 So. 2d Miss. Cases 1 (1981).

lature narrowed the court's authority by amending section 146 of the Mississippi Constitution.[17] This action did little to sway the court's expansive view of its rule-making authority. In 1985, the court again disregarded the enabling legislation and adopted the Mississippi Rules of Evidence without any oversight from the legislature.[18]

The next major rule-making confrontation between the legislature and the judiciary occurred in the 1989 decision of *Hall v. State*.[19] In *Hall*, the court addressed a statute that provided for the admission of hearsay in child abuse cases,[20] a statute in direct conflict with M.R.E. 802.[21] In declining to recognize the validity of the statute, the court fell back on the inherent powers argument utilized in *Newell* and further stated the Mississippi Rules of Evidence were *"the ultimate authoritative legislation that the making of the rules of evidence, and particularly rules regulating the use of hearsay evidence, lies on judicial turf."*[22] As a result of *Hall*, "any authority em-

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[17] MISS. CONST. art. VI § 146 (amended 1983). Section 146 was amended to read in part that the supreme court was to "exercise no jurisdiction on matters other than those specifically provided by the Constitution or by general law." *Id.*

[18] Order of September 24, 1985, 474-77 So. 2d Miss. Cases 27 (1985). The order provided that "[t]he Mississippi Rules of Evidence shall govern all proceedings in any action had on or after January 1, 1986." *Id.* It is interesting to note that the order recognizes the input of the Advisory Committee without making any reference to the court's unilateral abandonment of the legislature's oversight of the rule-making process.

[19] 539 So. 2d 1338 (Miss. 1989).

[20] MISS. CODE ANN. §§ 13-1-401 to -415 (1972 & Supp. 1997). The statute provided that a third party could testify as to statements made to her by an abused child. *Id.*

[21] MISS. R. EVID. 802 provides that "[h]earsay is not admissible except as provided by law." *Id.* The court in *Hall* interpreted this provision to mean "valid" law, which the court described as law which "emanates from a source having authority to make it." *Hall,* 539 So. 2d at 1344. The court reasoned that the statute was not "valid law" because the ultimate authority to enact rules of evidence rested with the judiciary. *Id.* at 1346.

[22] *Hall*, 539 So. 2d at 1346. The court used the inherent powers argument as a means of establishing the position that the separation of powers doctrine required that "no officer of one department of government may exercise a power at the core of the power constitutionally committed to one of the other departments." *Id.* at 1345 (citing Alexander v. State, 441 So. 2d 1329, 1345-46 (Miss. 1983)). "The inherent power of the Supreme Court to promulgate procedural rules for the

ployed by the legislature to create rules of evidence and procedure is purely 'legislative fiat.'"[23]

The enactment of Senate Bill 2792 broke the legislature's silence following the decision in *Hall*.[24] Senate Bill 2792, enacted just two years after the *Hall* decision,[25] attempted to repeal all evidentiary statutes.[26] This action by the legislature strongly suggests it has given up the fight for concurrent rule-making authority.

III. MISSISSIPPI RULE OF EVIDENCE 1103: THE REPEALER

Now that the legislature has apparently conceded to the exclusive rule-making authority of the judiciary,[27] the outcome of conflicts arising between evidentiary statutes and the Mississippi Rules of Evidence is governed by M.R.E. 1103. M.R.E. 1103, otherwise known as the Repealer,[28] provides:

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efficient disposition of its case load stems from the fundamental constitutional precepts of separation of powers and the vesting of judicial powers in the Courts." Brown v. City of Water Valley, 319 So. 2d 649, 650-51 (Miss. 1975) (citing Matthews v. State, 288 So. 2d 714 (Miss. 1974)). "As the paramount body within the Judicial branch of government, we are the guardians of judicial process, charged with guiding the operation of the judicial branch toward the 'efficient disposition of judicial business.' Our charge extends to the promulgation and control of practice and procedure in the courts." *In re* Mississippi Judicial Info. Sys., 533 So. 2d 1110, 1111 (Miss. 1988). *See also* Lewis v. Louisiana State Bar Ass'n, 792 F.2d 493, 497 (5th Cir. 1986) (citing Bates v. State Bar of Arizona, 433 U.S. 350 (1977)) ("[w]hen exercising its sovereign rule-making authority, a state supreme court occupies the same position as that of the state legislature").

[23] Ball, *supra* note 6, at 366 (citing *Hall,* 539 So. 2d at 1347 n.20). The court's position in *Hall* implies that section 9-3-71 (stating that supreme court rules by the legislature shall have no effect) and section 9-3-71(3) (stating that any supreme court rule not submitted to the legislature "shall be of no force and effect") are repealed. *But see Marshall*, 662 So. 2d at 573 (Hawkins, C.J., dissenting) (stating that supreme court does not have power to exclusion of Legislature to promulgate rules of practice and procedure in courts).

[24] 573 Miss. Gen. Laws 979 (1991).

[25] *Hall*, 539 So. at 1338.

[26] For a complete list of evidentiary statutes repealed by Senate Bill 2792 see 573 Miss. Gen. Laws 979 (1991). There were however, several evidentiary statutes that were not addressed by Senate Bill Number 2792 presumably due to oversight. *See* CAROLYN ELLIS STATON, MISSISSIPPI EVIDENCE 69-70 (3d ed. Supp. TOM R. MASON 1997).

[27] *See supra* notes 19-26 and accompanying text.

[28] MISS R. EVID. 1103. The title "Repealer" was added by the publisher of the

"All evidentiary rules, whether provided by statute, court decision or court rule, which are inconsistent with the Mississippi Rules of Evidence are hereby repealed."[29] From the explicit language of the Repealer it appears the courts should have little trouble reaching a decision when a statute and a rule are in conflict. From the language of the statute, the decision should be that the rule is controlling and the statute is repealed. This has not proven to be the case.

Since the creation of the Mississippi Rules of Evidence, the supreme court has consistently been inconsistent when faced with conflicting evidentiary statutes and rules. The obvious conflict for practitioners occurs when a statute is in conflict with the Mississippi Rules of Evidence, but is nonetheless cited as authority by the court. Another conflict arises when an evidentiary statute exists that is not "inconsistent with" an evidentiary rule, but applies to an area not covered by the Mississippi Rules of Evidence. Section IV will identify these conflicts to warn practitioners of potential pitfalls in evidentiary litigation created by the supreme court's haphazard approach to the Repealer.

IV. Currently Recognized Evidentiary Statutes that Conflict with the Mississippi Rules of Evidence

A. Miss. Code Ann. § 13-1-11 Convicted Perjurer as a Witness

In *Fusilier v. State*,[30] the Mississippi Supreme Court addressed the issue of whether a person convicted of perjury could testify as a witness.[31] Although it appears that such an

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Mississippi Rules of Evidence. *Id.* This is an unfortunate title for this provision given the fact that it is the legislature, not the judiciary, which possesses the exclusive authority to repeal statutes. *See* Culberson v. State, 612 So. 2d 343, 352 (Miss. 1992). *See also Hall*, 539 So. 2d at 1359 (Hawkins, C.J., concurring).

[29] Miss. R. Evid. 1103.

[30] Fuselier v. State, 702 So. 2d 388 (Miss. 1997).

[31] *Fuselier*, 702 So. 2d at 388. Eric Fuselier was convicted and sentenced to death for the murder of Rose Gunter. *Id.* at 389. At trial, Fuselier sought to introduce the testimony of David McFee. *Id.* at 392. McFee had previously been convicted of perjury as a result of inconsistencies between his testimony at

approach was completely unnecessary,[32] the court applied section 13-1-11 of the Mississippi code and M.R.E. 601.[33] Section 13-1-11 provides in relevant part:

> a conviction of a person for any offense, except perjury or subornation of perjury, shall not disqualify such person as a witness, but such conviction may be given in evidence to impeach his credibility. A person convicted of perjury or subornation of perjury shall not afterwards be a competent witness in any case, although pardoned or punished for the same.[34]

M.R.E. 601 provides in relevant part: "[e]very person is competent to be a witness except as restricted by the following . . . (b) [a] person convicted of perjury or subornation of perjury shall not be a competent witness in any case, even though pardoned or punished for the same. . . . "[35]

After abandoning M.R.E. 601,[36] the court stated, "*We encourage the Legislature to take similar action in relation to Miss. Code. Ann. § 13-1-11.*"[37] This statement is certain to cause trouble for practitioners faced with the question of whether a convicted perjurer can testify as a witness. As amended, M.R.E. 601 allows convicted perjurers to testify as witnesses.[38] In light of the supreme court's slip of the tongue, a good argument can be made that section 13-1-11 still remains applicable — in direct conflict with revised M.R.E. 601 — until the legislature takes action to repeal or amend the statute.[39]

Fuselier's first trial and his pretrial statements. *Id.*

[32] MISS. RULE EVID. 601 cmt. Subsection (b) of M.R.E. 601 "retains the substance of M.C.A. § 13-1-11". *Id.* Given this statement, it is unclear why the court chose to apply section 13-1-11 in the first place.

[33] *Fuselier,* 702 So. 2d at 392.

[34] MISS. CODE ANN. § 13-1-11 (1991).

[35] MISS. R. EVID. 601.

[36] *Fuselier,* 702 So. 2d at 394. The court abandoned M.R.E. 601 in favor of a rule that allows a convicted perjurer to testify as a witness. *Id.* Under revised M.R.E. 601, opposing counsel is given the opportunity to cross-examine the witness regarding the perjury conviction. *Id.*

[37] *Id.*

[38] *See supra* note 35 and accompanying text.

[39] In one breath, the court amended M.R.E. 601 in order to allow convicted perjurers to testify; in the next, it gave validity to section 13-1-11, an evidentiary

This inconsistency would have been remedied had the court simply invoked the power of the Repealer.[40]

B. Miss. Code Ann. § 13-1-21. Statutory Health Care Provider-Patient Privilege.

In *Touchstone v. Touchstone*,[41] the Mississippi Supreme Court addressed the issue of whether a communication made between a licensed clinical social worker and her patient was privileged.[42] After applying M.R.E. 503 and section § 13-1-21 of the Mississippi code, the court held no such privilege existed.[43] M.R.E. 503 provides:

> [a] patient has a privilege to refuse to disclose and to prevent

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statute that could not have been more in conflict with revised M.R.E. 601 had that been the goal of its drafters. *See supra* notes 34-35 and accompanying text.

[40] Under the Repealer, section 13-1-11, an evidentiary statute now "inconsistent" with the Mississippi Rules of Evidence, would presumably be "repealed". MISS. R. EVID. 1103. However, the court failed to make any mention of the Repealer, despite the obvious conflict between evidentiary statute and rule created by its decision. *See Fuselier*, 702 at 392-94. To the contrary, Justice Smith went as far as to state that "the Legislature's plenary power, subject to certain constitutional guarantees, . . . may legitimately decide that persons convicted of a felony shall not be competent witnesses subsequent thereto." *Fuselier*, 702 So. 2d at 396 (Smith, J., dissenting). *See also* Sudduth v. State, 562 So. 2d 67, 70 (Miss. 1990) (emphasis added) ("every person is competent to be a witness except as restricted by section 13-1-7 (competency of spouses) and section 13-1-11 (persons convicted of perjury or subornation of perjury), *or by the Miss. R. Evid. See Miss. R . Evid. 601"*).

[41] Touchstone v. Touchstone, 682 So. 2d 374 (Miss. 1996).

[42] *Touchstone*, 682 So. 2d at 377. Monna and Dr. Touchstone were granted a divorce. *Id.* at 376. Monna was awarded primary care, custody and control of their minor child. *Id.* On November 2, 1993, Dr. Touchstone asserted that the custody arrangement should be modified due to a substantial change in circumstances. *Id.* After a hearing on the matter, the chancellor denied Dr. Touchstone's motion. *Id.* at 376, 379. During this hearing, Dr. Touchstone sought to introduce evidence of communications made between Monna and a licensed social worker. *Touchstone,* 682 So. 2d at 379. The chancellor ruled that such communications were privileged pursuant to M.R.E. 503. *Id.* Dr. Touchstone appealed to the Mississippi Supreme Court. *Id.*

[43] *Id.* The court first analyzed the communications under M.R.E. 503 and concluded that the rule limited the privilege "to communications with physicians and psychotherapists". *Id.* The court then determined that the privilege set forth in section 13-1-21 did not include licensed clinical social workers. *Id.*

> any other person from disclosing . . . knowledge derived by the *physician or psychotherapist* by virtue of his professional relationship with the patient, or (B) confidential communications made for the purpose of diagnosis or treatment . . . among, himself, *his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist*, including members of the patient's family.[44]

In contrast, section 13-1-21 casts a broader net into the area of privileged communications and includes "all communications made to a *physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor* by a patient under his charge . . . ."[45]

The conflict for practitioners occurs with privilege issues involving health care providers who fall within the scope of section 13-1-21, but who are beyond the confines of M.R.E. 503, as in the case of osteopaths, dentists, nurses, pharmacists, podiatrists, optometrists, and chiropractors.[46] *Touchstone* indicates the court will continue to apply section 13-1-21 in this situation despite its obvious conflict with M.R.E. 503.[47] Because section 13-1-21 is broader in scope than M.R.E. 503, it goes without saying that in certain instances section 13-1-21 will be "inconsistent with" the application of M.R.E. 503.[48] As an evidentiary statute, "inconsistent with" a rule of evidence, section 13-1-21 should no longer apply given the express language of the Repealer.[49]

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[44] MISS. R. EVID. 503.

[45] MISS. CODE ANN. § 13-1-21 (1972).

[46] *See supra* notes 44-45 and accompanying text.

[47] *Touchstone,* 682 So. 2d 374 at 380. "[L]icensed clinical social workers do not fall within the definition of any profession *to which the Rule [503] or the general privilege afforded by the statute [section 13-1-21] apply*." *Id.* (emphasis added). The comment to M.R.E. 503 only appears to add further controversy to this problem, "[e]xisting Mississippi law is codified at M.C.A. § 13-1-21. The existing statute is broader than Rule 503(a). . . . " MISS. R. EVID. 503, cmt. . It is unclear why the drafters would give validity to section 13-1-21 by identifying its inconsistencies with M.R.E. 503 given the clear intent of the Repealer to prevent such conflicts. *See supra* notes 27-29 and accompanying text.

[48] *See supra* note 44.

[49] *See supra* notes 27-29 and accompanying text. Justice Hawkins pointed out the error in continuing to apply section 13-1-21 in Swan v. I.P., Inc., 613 So. 2d

C. Miss. Code Ann. § 13-1-3. Impeachment for Interest in Cause / Conviction of Crime.

In *McLemore v. State*,[50] the Mississippi Supreme Court addressed the issue of whether a defendant could present evidence that witnesses were biased and prejudiced against him.[51] In reaching its decision, the court relied solely on section 13-1-13 of the Mississippi code without making any reference to M.R.E. 616, the evidentiary rule titled "Bias of Witness".[52] Section 13-1-13 provides in relevant part that "[a]ny witness may be examined *touching his interest in the cause or his conviction of any crime*, and his answers may be contradicted, and his interest or his conviction of a crime established by other evidence."[53] M.R.E. 616 also addresses this issue, but provides greater guidance to the trial courts, stating, "[f]or the purpose of attacking the credibility of a witness, *evidence of bias, prejudice, or interest of the witness* for or against any party to the case is admissible."[54] While the court's refusal to apply M.R.E. 616 may have been an oversight,[55] *McLemore*

846, 861 (Miss. 1993) (Hawkins, J., dissenting). Justice Hawkins observed that "[p]er Hall, MISS. CODE ANN. § 13-1-21 was 'repealed.' *See also* Rule 1103 MRE." *Id.* at 861 n.1. *But see* Davis v. Smart Corp., 1997 WL 786763, *4 (N.D. Miss. 1997) (district court evaluated health care provider-patient privilege issue solely within confines of section 13-1-21 without any reference to M.R.E. 501).

[50] 669 So. 2d 19 (Miss. 1996).

[51] *McLemore*, 669 So. 2d at 23. McLemore stabbed Nadine Walker in the course of robbing a store in Morton, Mississippi. *Id.* at 20. McLemore was convicted and sentenced to twenty-five years in prison. *Id.* at 21. On appeal to the Mississippi Supreme Court, McLemore contended that the lower court erred in refusing to allow him to present evidence showing the bias and prejudice of the Sheriff's Department against him. *Id.* at 23.

[52] *Id.* at 23-25. The court held that McLemore was entitled to put on evidence showing the Sheriff Department's bias and prejudice against him without making any reference to M.R.E. 616. *Id.* at 25. This error likely resulted from the court's reliance on several pre-Rule opinions cited by McLemore. *Id.* at 23; *see* Cantrell v. State, 507 So. 2d 325 (Miss. 1987) (analyzing bias question); Sanders v. State, 352 So. 2d 822 (Miss. 1977) (same); Shorter v. State, 257 So. 2d 236 (Miss. 1972) (same). M.R.E. 616 was adopted by the Mississippi Supreme Court on March 1, 1989. MISS. R. EVID. 616, cmt. .

[53] MISS. CODE. ANN § 13-1-13 (1972).

[54] MISS. R. EVID. 616.

[55] *See supra* note 52 and accompanying text.

creates the potential for conflict given the fact that section 13-1-13 fails to include the "bias" language of M.R.E. 616.[56] Such a conflict could be circumvented if the court elected to follow the express provisions of the Repealer.[57]

D. Miss. Code Ann. § 73-33-16. Certified Public Accountant-Client Privilege

Reenacted by the legislature in 1991,[58] section 73-13-16 created a CPA-client privilege which does not exist under the Mississippi Rules of Evidence.[59] Section 73-33-16 of the Mississippi code provides in relevant part:

> a certified public accountant and any partner, officer, shareholder or employee of a certified public accountant shall not be required by any court of this state to disclose, and shall not voluntarily disclose, information communicated to him by the client relating to and in connection with services rendered to the client by the certified public account in his practice as a certified public accountant. *Such information shall be deemed confidential and privileged.*[60]

Arguably, section 73-13-16 is "inconsistent with" M.R.E. 501 under the Repealer.[61] M.R.E. 501 provides in relevant part

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[56] *See supra* notes 53-54 and accompanying text. *See also* STATON (Supp. 1997), *supra* note 26 at 69.

[57] It is difficult to understand why the court would apply an evidentiary statute without even making reference to the more appropriate evidentiary rule given the fact that the court itself assumed responsibility for the creation of such rules. *See supra* notes 1-26 and accompanying text. Because the court in *Cantrell* (relied on by the *McLemore* court) made reference to bias and motive as appropriate points of inquiry, *Mclemore,* 669 So. 2d at 23 (citing *Cantrell*, 507 So. 2d ad 330), the substantive effect of the opinion does not produce as drastic a result as the errors in *Fusilier* and *Touchstone*. *See supra* notes 22-52 and accompanying text. Regardless of the degree of harm, it is clear that section 13-1-13 requires a visit from the Repealer in order to head off the inevitable conflicts on the horizon.

[58] 1983 Miss. Gen. Laws, ch. 411, § 10; 1990, ch. 322, § 5; reenacted, 1991, ch. 306, § 10, effect from and after July 1, 1991.

[59] MISS. CODE ANN. § 73-33-16. The only privileged relationships recognized by the Mississippi Rules of Evidence are: (1) lawyer-client at M.R.E. 502; (2) physician and psychotherapist-patient at M.R.E. 503; (3) husband-wife at M.R.E. 504; and (5) priest-penitent at M.R.E. 505.

[60] MISS. CODE ANN. 73-33-16 (1990).

[61] MISS. R. EVID. 501. M.R.E. 501 basically states that the only privileged

that "[e]xcept as otherwise provided, . . . *no person* has a privilege to (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any matter or producing any object or writing."[62]

To this point, the CPA-client privilege provided for in section 73-13-16 has not been addressed by an appellate court in Mississippi.[63] If this section is addressed, the court will be faced with a statute that expands the protection of privilege into an area not specifically provided for by the Mississippi Rules of Evidence, without directly contradicting any specific evidentiary rule.[64] In order to "repeal" section 73-13-16, the court may have to interpret M.R.E. 501 creatively to create the "inconsistency" required to invoke the Repealer.[65]

E. Miss. Code Ann. § 11-1-61. Medical Expert Qualifications

In 1990, the Mississippi Legislature passed House Bill Number 701.[66] Codified in section 11-1-61 of the Mississippi

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relationships recognized in Mississippi are those provided by the Mississippi Rules of Evidence. *Id.* M.R.E. 501 provides an exception for privileges recognized by "the Untied States Constitution, the State Constitution, by these rules, or *by other rules applicable in the courts of this state* to which these rules apply." MISS. R. EVID. 501 (emphasis added). Because section 73-33-16 is evidentiary in nature, *see supra* notes 59-60 and accompanying text, the court could repeal the statute if it determined that it was inconsistent with the Mississippi Rules of Evidence. MISS. R. EVID. 1103. This circular approach would then lead us to the language of M.R.E. 501; a repealed statute would be inconsistent with M.R.E. 501 because section 73-33-16 would no longer be considered a rule "applicable in the courts of this state." MISS. R. EVID. 501.

[62] MISS. R. EVID. 501.

[63] Interestingly, Justice Scalia cited section 73-33-16 as an example of special legislation achieved by groups in Jaffee v. Redmond, 518 U.S. ___, 116 S.Ct. 1923, 1939 (1996) (Scalia, J., dissenting).

[64] *See supra* notes 59-62 and accompanying text.

[65] *Id.*

[66] House Bill Number 701, 440 Miss. Gen. Laws 292 (1990). The preamble describes it as

> an act to require that in actions against physicians arising out of the provision or failure to provide health care a person may qualify as an expert witness on the appropriate standard of care if he is licensed in this state or some other state as a doctor of medicine.

Code, the statute provides that "a person may qualify as an expert witness on the issue of the appropriate medical standard of care *if the witness is licensed in this state, or some other state, as a doctor of medicine.*"[67] Simply stated, section 11-1-61 makes a general practitioner doctor eligible to testify on any medical standard of care if he is a licensed physician in any state.

It is apparent that section 11-1-61 would be considered an evidentiary statute in anyone's book. However, because it does not specifically conflict with an evidentiary rule, it does not appear that the court could invoke M.R.E. 1103 in order to repeal the statute.[68] When litigation arises, the court will have to decide whether to apply a statutory rule of evidence where there is no corresponding evidentiary rule.[69]

Id. It is interesting to note that the bill was passed just one year prior to Senate Bill 2792 which attempted to repeal all evidentiary statutes. *See supra* note 24-26 and accompanying text.

[67] MISS. CODE ANN. § 11-1-61 (1991) (emphasis added). The full text of section 11-1-61 provides that

> [i]n any action for injury or death against a physician, whether in contract or in tort, arising out of the provision of or failure to provide health care services, a person may qualify as an expert witness on the issue of the appropriate medical standard of care if the witness is licensed in this state, or some other state, as a doctor of medicine.

Id.

[68] MISS. R. EVID. 701 to 706. Article VII of the Mississippi Rules of Evidence deals with the admission of expert testimony. *Id.* The only reference to an expert's qualifications is contained in M.R.E. 702 which provides that "a witness *qualified as an expert* by knowledge, skill, experience, training, or education may testify." MISS. R. EVID. 702 (emphasis added). The comment to M.R.E. 702 does indicate that traditional standards for determining that "the witness is indeed qualified to speak an opinion *on a matter within his purported field of knowledge*" still apply. MISS. R. EVID. 702, cmt. (emphasis added). However, even the broadest interpretation of this comment to M.R.E. 702 fails to create the inconsistency between statute and rule required before the court could repeal section 11-1-61 under M.R.E. 1103. *See supra* notes 27-29 and accompanying text.

[69] *See supra* notes 67-69 and accompanying text.

V. Evidentiary Statutes that do not Conflict with the Mississippi Rules of Evidence

In many instances, an evidentiary statute will coincide with an evidentiary rule in a manner that does not present any substantive conflict. When faced with statutes of this nature, which law to apply — the evidentiary statute or rule of evidence — is left to the discretion of the court. This section identifies the evidentiary statutes recently cited by the Mississippi Supreme Court that are consistent with the Mississippi Rules of Evidence.

A. Miss. Code Ann. § 13-1-77. Admissibility of Certified Copies of Clerk's Records.

In *McIlwain v. State*, the Mississippi Supreme Court held that abstracts of certified copies of court records were admissible to prove prior convictions.[70] In reaching this decision, the court stated that *"Miss. Code Ann. § 13-1-77 and M.R.E. 1005* specifically provide that abstracts or records are admissible to prove prior convictions."[71]

B. Miss. Code Ann. § 13-1-5. Spousal Incompetency

In *Fisher v. State*, the Mississippi Supreme Court held that according to section 13-1-5 of the Mississippi code, statements made in connection with the criminal prosecution of a spouse for acts against a child are excepted from spousal incompetency.[72] In reaching this decision, the court noted section 13-1-5

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[70] McIlwain v. State, 700 So. 2d 586 (Miss. 1997). Jerry McIlwain received his third D.U.I. conviction on July 2, 1993. *McIlwain*, 700 So. 2d at 588. On appeal, McIlwain asserted that the State failed to prove his second D.U.I. conviction because it relied solely on certified copies of the clerk's records from that proceeding. *Id.* at 589.

[71] *Id.* (emphasis added). Section 13-1-77 provides that "[a]ll public officers in this state having the charge or custody of any public books, records, papers, or writings, *are authorized to certify copies of the same*." *Id.* (emphasis added).

[72] Fisher v. State, 690 So. 2d 268, (Miss. 1996). Derrick Fisher was convicted of the capital rape of his eleven-year old niece. *Fisher*, 690 So. 2d at 269. At trial, Fisher's wife testified to a conversation she had with her husband where he "admitted the truth." *Id.* at 271. On appeal, Fisher argued that the communica-

"essentially states the same rule as M.R.E. 601 (a)(2)."[73]

C. Miss. Code Ann. § 97-3-68. Rape Shield

In *Heflin v. State*, the Mississippi Supreme Court applied M.R.E. 412(c) and held evidence of a rape victim's past sexual behavior with persons other than the accused was admissible upon the issue of whether the defendant was the source of semen.[74] In a dissenting opinion, Justice Smith stated, *"Mississippi's Rape Shield statute, § 97-3-70, Miss. Code Ann. (1972 as amended), and Rule 412, Mississippi Rules of Evidence* were adopted to prevent such harassment of rape victims."[75]

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tion was protected by the husband-wife privilege set forth in M.R.E. 504(b). *Id.* The State argued that M.R.E. 504(b) conflicted with M.R.E. 601(a)(2). *Id.* at 272. The Mississippi Supreme Court held that Fisher's statement to his wife was protected by M.R.E. 504(b). *Id.* The court then amended M.R.E. 504(b) to reflect the same concerns as M.R.E. 601(a)(2). *Fisher,* 690 So. 2d at 272.

[73] *Id.* Section 13-1-5 provides that

> *[e]ither spouse is a competent witness and may be compelled to testify against the other in any criminal prosecution of either husband or wife for a criminal act against any child, for contributing to the neglect or delinquency of a child, or desertion or nonsupport of children under the age of sixteen (16) years, or abandonment of children.*

MISS. CODE ANN. § 13-1-5 (1972). M.R.E. 601 (a)(2) mirrors the language of section 13-1-5. MISS. R. EVID. 601. *See* MISS. R. EVID. 601, cmt. (stating that M.R.E. 601(a)(2) "retains the substance of M.C.A. § 13-1-5"); Williams v. State, 667 So. 2d 15, 19 (Miss. 1996) (stating that "Rule 601 of the Mississippi Rules of Evidence incorporates this [section 13-1-5] statutory provision").

[74] Heflin v. State, 643 So. 2d 512, 520 (Miss. 1994). Homer Heflin was convicted of raping his sixteen-year old daughter. *Heflin*, 643 So. 2d at 515. Prior to trial, the State sought a ruling that precluded evidence of the victim's past sexual behavior under M.R.E. 412. *Id.* In response, Heflin made an offer of proof, contending that the evidence was admissible because it went to the question of whether he was the source of the semen found in the victim's bathing suit. *Id.* The trial court ruled that Heflin failed to show sufficient relevancy for admission of the evidence. *Id.* at 516. On appeal, the Mississippi Supreme Court reversed the trial court's decision and remanded the case. *Id.*

[75] *Heflin*, 643 So. 2d at 522. Section 97-3-70 provides in part that in a rape prosecution; opinion evidence, reputation evidence and evidence of specific instances of the victim's past sexual conduct with other than the accused is not admissible unless it "rebuts evidence introduced by the prosecutor *which proves or tends to prove that the accused is the . . . source of semen found in the victim . . . .*" MISS. CODE ANN. § 97-3-70(4) (1994) (emphasis added). M.R.E. 412 provides that

Justice Smith's reference to section 97-3-70 is somewhat controversial because the statute was supposedly repealed by the legislature in 1991.[76]

D. Miss. Code Ann. § 73-31-29. Psychotherapist-Patient Privilege

In *Everett v. State*,[77] the Mississippi Supreme Court concluded that the defendant waived the psychotherapist-patient privilege set forth in section 73-31-29 and M.R.E. 503.[78] The

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> evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible unless such evidence other than reputation or opinion evidence is '(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of *whether the accused was or was not, with respect to the alleged victim, the source of semen* . . . .

MISS. R. EVID. 412(b)(2)(A) (emphasis added).

[76] *See supra* note 26 and accompanying text.

[77] 572 So. 2d 838 (Miss. 1991).

[78] Everett, 572 So. 2d at 840. Section 73-31-29 provides that:

> *[a] psychologist shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall a psychologist's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he as acquired in such capacity.*

MISS. CODE ANN. § 73-31-29 (1994) (emphasis added). M.R.E. 503 provides in relevant part that:

> (b) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing (A) knowledge derived by the physician or psychotherapist by virtue of his professional relationship with the patient, or (B) confidential communications made for the purpose of diagnosis or treatment . . . among himself, his physician or psychotherapist, *and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.*

MISS. R. EVID. 503. It is possible that a discrepancy exists between the evidentiary statute and the rule in this instance in terms of who is "participating in the diagnosis or treatment" of the patient. *See* MISS. R. EVID. 503. Arguably, a psychologist's secretary, clerk, or stenographer is outside the scope of M.R.E. 503 because that they do not directly participate in the treatment of the patient. *See*

court reasoned that the defendant waived the privilege when he required his psychotherapist to write a letter to the court describing his treatment progress.[79]

E. Miss. Code Ann. § 13-1-22. Confidentiality of Priest-Penitent Communications

Section 13-1-22 provides for a priest-penitent privilege.[80] This evidentiary statute is restated in its entirety in M.R.E. 505.[81]

VI. CONCLUSION

Any evidentiary statutes in conflict with the Mississippi Rules of Evidence should be repealed pursuant to rule 1103 of the Mississippi Rules of Evidence.[82] Any evidentiary statutes which reiterate the language of an evidentiary rule should also be repealed as a matter of consistency in terms of applying evidentiary statute or rule.[83] In cases where the Mississippi Supreme Court has adopted these approaches, the evidentiary issues have been resolved without controversy.[84] As this com-

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Touchstone, 682 So. 2d at 379 (stating that M.R.E. 503 and section 73-31-29 do not extend psychotherapist-patient privilege to licensed clinical social workers).

[79] *Everett*, 572 So. 2d at 840. Charles Everett, Jr. was convicted of the sexual battery of his step-daughter. *Id.* at 838. Prior to trial, Everett requested that Ray Hale, his psychotherapist, submit a letter to the court addressing progress in therapy. *Id.* The letter was not introduced at trial, but the trial court allowed the psychotherapist to testify regarding conversations with Everett. *Id.* at 839. On appeal, the Mississippi Supreme Court reasoned that Everett waived the psychotherapist-patient privilege set forth in section 73-31-29 and M.R.E. 503 by requiring his psychotherapist to submit a letter to the court describing his progress in therapy. *Id.* at 840.

[80] MISS. CODE ANN. § 13-1-22. Section 13-1-22 provides the definition of a "clergyman;" defines when a communication between clergyman and penitent is "confidential;" and describes the scope of the privilege in terms of to whom it can be extended. *Id.*

[81] MISS. R. EVID. 505. The comment to M.R.E. 505 specifically states that the rule is a restatement of section 13-1-22. MISS. R. EVID. 505, cmt.; *see* Banks v. State, 1997 WL 751940, at, *22 (applying M.R.E. 505 without referencing section 13-1-22); *but see* Simpson v. Tennant, 871 S.W.2d 301, 307 (Tex. Ct. App. 1994) (making referencing to language contained in comment to section 13-1-22).

[82] *See supra* notes 30-69 and accompanying text.

[83] *See supra* notes 70-81 and accompanying text.

[84] *See* Amacker v. State, 676 So. 2d 909, 911 (Miss. 1996) (stating that

ment points out, however, proper application of the Repealer does not create the problem.

The problem at the core of the evidentiary statute/rule conflict in Mississippi is not one of interpretation, but instead appears to be one of application. For this reason, turning to other states does not appear to be the most logical means of addressing the problem. Some states utilize an evidentiary rule almost identical to Mississippi's Repealer,[85] other state's evi-

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M.R.E. 412 controls over any statutory evidentiary rules conflicting with it); Sanders v. State, 586 So. 2d 792, 794-95 (Miss. 1991) (stating Mississippi Rules of Evidence apply rather than pre-rules cases creating statutory exception in child sexual abuse cases); Cox v. State, 586 So. 2d 761, 765 (Miss. 1991) ("[t]he issue of whether a document is legally authentic . . . is now governed by Rules 901 and 902 of the Mississippi Rules of Evidence"); Whitehurst v. State, 540 So. 2d 1319, 1323 (Miss. 1989) (stating that section 63-11-7 must yield to the Mississippi Rules of Evidence pursuant to M.R.E. 1103); Mitchell v. State, 539 So. 2d 1366, 1369 (Miss. 1989) (stating that M.R.E. 1103 "abrogated evidentiary rules set out in caselaw"); Whittington v. Whittington, 535 So. 2d 573, 580 (Miss. 1988) ("[t]his statute [MISS. CODE ANN. § 13-1-7] was effectively done away with under the general rule of competency promulgated by M.R.E. 601"); Doby v. State, 532 So. 2d 584, 590 (Miss. 1988) ("evidence rules, having been adopted subsequent to the Uniform Criminal Rules of the Circuit Court, and containing the specific Repealer Rule 1103, must control over former Uniform Criminal Rule 5.09"); Monroe v. State, 515 So. 2d 860, 868 (stating that evidentiary issues raised after January 1, 1986 must be governed by the Mississippi Rules of Evidence); Bryant v. Alpha Entertainment Corp., 508 So. 2d 1094, 1098 (Miss. 1987) ("Mississippi Code Annotated, § 63-11-43 (1972), has been repealed under Rule 501 of the new Miss. Rules of Evidence").

[85] *Id.* IDAHO R. EVID. 1102. Idaho Rule of Evidence 1102 entitled "Effect on Evidentiary Statutes and Rules" provides that "[s]tatutory provisions and rules governing the admissibility of evidence, to the extent they are evidentiary and to the extent that they are in conflict with the applicable rules of Idaho Rules of Evidence, are of no force or effect." *Id.* Because the judiciary does not posses the power to repeal a statute, this is probably a better title for the rule than the Repealer designation given to M.R.E. 1103 by the drafters of the comment. *See* MISS. R. EVID. 1103, cmt. . New Jersey Rule of Evidence 2A:84A-40 provides in relevant part that;

> [a]ll previous laws . . . dealing with the admission or rejection of evidence . . . which shall be a conflict or inconsistent with such rule or rules [of the New Jersey Rules of Evidence] . . . shall be of no further force or effect after such rule or rules shall have taken effect.

N.J. R. EVID. 2A:84A-40. Wyoming Rule of Evidence 1102 entitled "Statutes Superseded" provides in relevant part that "such statutes and all other laws in conflict with these rules shall be of not further force or effect." WYO. R. EVID. 1102.

dentiary rules arrive at the same conclusion via a different path.[86] Only one state, New Hampshire, expressly denies its supreme court the authority to supersede evidentiary statutes in conflict with the state's rules of evidence.[87] Instead of attempting to re-draft the language of the Repealer, the courts should simply adhere to its mandate: evidentiary statutes in conflict with evidentiary rules should be repealed.

Jason Sage McCormick

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[86] Hawaii Rule of Evidence 626-3 entitled "Inconsistent Laws" provides that "[i]f any other provision of law, including any rule promulgated by the supreme court, is inconsistent with this chapter, this chapter shall govern unless this chapter or such inconsistent provision of law specifically provides otherwise." HAW. R. EVID. 626-3. Indiana Rule of Evidence 101 provides in relevant part that "[i]f these rules do not cover a specific evidence issue, common or statutory law shall apply." IND. R. EVID. 101. Michigan Rule of Evidence 101 provides in relevant part that "[a] statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective until superseded by rule or decision of the Supreme Court." MICH. R. EVID. 101. The comment to Ohio Rule of Evidence 102 provides that the rules of evidence "supersede statutes where there is a conflict between the rule and the statute, but the statute to be superseded must relate to procedure and not substance." OHIO. R. EVID. 102, cmt. . The Preliminary Note to the Utah Rules of Evidence provides that "[a]ny existing statutes inconsistent with these rules, if and when these rules are adopted by the Supreme Court, will be impliedly repealed." UTAH. R. EVID., preliminary note. West Virginia Rule of Evidence 101 provides that any "statute not in conflict with any of these rules or any other rules adopted by the Supreme Court of Appeals shall be deemed to be in effect until superseded by rule or decision of the Supreme Court of Appeals." W.V. R. EVID. 101.

[87] New Hampshire Rule of Evidence 100 provides in relevant part that evidentiary rules "shall be effective to the extent they are not inconsistent with statutory law in effect on that date, *provided, that upon any later legislative repeal of such inconsistent statutes* the appropriate rules shall then become effective." NH. R. EVID. 100. This language indicates that unlike the Mississippi legislature, the New Hampshire legislature retained control over the enactment and repeal of evidentiary statutes. *Id. See also* DEL. R. EVID. 1103. Delaware Rule of Evidence 1103 entitled "Effective Date" provides that evidentiary rules apply "except to the extent that application of these Rules *would not be feasible, or would work injustice, in which event former evidentiary principles apply.*" *Id.* (emphasis added).

Chapter 13 Cram Down Interest Rates: Another Day, Another Dollar—A Cry For Help in Ending the Quest for the Appropriate Rate

I. Introduction

In a Chapter 13 proceeding, the Bankruptcy Code[1] provides three different methods for protecting the rights of secured creditors. First, the creditor may simply accept the plan proposed by the debtor.[2] Second, the debtor may surrender the property to the creditor.[3] Third, the debtor may keep the property, so long as the secured creditor retains its lien and receives payments equal to its present value.[4] This third option, commonly known as the "cram down" provision, allows Chapter 13 debtors to keep property over the objection of secured creditors.[5] The cram down option enables debtors to keep property they would otherwise lose, thus allowing them to maintain a normal lifestyle and produce income to fund plan payments.[6]

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[1] 11 U.S.C. §§ 101 to 1330 (1994 & Supp. 1996).

[2] 11 U.S.C. § 1325(a)(5)(A) (1994 & Supp. 1996).

[3] 11 U.S.C. § 1325(a)(5)(C) (1994 & Supp. 1996).

[4] 11 U.S.C. § 1325(a)(5)(B) (1994 & Supp. 1996). Present value is also used analogously in Chapter 11 "cram down" situations, which "contemplat[e] a present value analysis that will discount value to be received in the future . . . " H.R. Rep. No. 95-595, at 414 (1977). *See also* Hon. John K. Pearson, et al., *Ending the Judicial Snipe Hunt: The Search for the Cramdown Interest Rate*, 4 Am. Bankr. Inst. L. Rev. 35, 35 (1996) (noting present value requirement not explicitly stated in statute).

[5] Federal Land Bank of Louisville v. Glenn (*In re* Glenn), 760 F.2d 1428, 1433 (6th Cir. 1985). A specific purpose of the amended Bankruptcy Code is to allow modification of secured creditors' contract rights. *In re Glenn*, 760 F.2d at 1433. Cram down is defined as an expression describing confirmation of a Chapter 11, 12, or 13 plan, notwithstanding the objections of creditors. Black's Law Dictionary 366 (6th ed. 1990).

[6] *In re Glenn*, 760 F.2d at 1433. The purpose of Chapter 13 is to enable an

Alas, the cram down option, founded on such noble intentions, has developed into a quagmire of litigation on two pertinent questions. First, how will the collateral be valued?[7] Second, what rate of interest will be paid by the debtor over the course of the plan?[8] For now, based on the Supreme Court's recent decision in *Associates Commercial Corporation v. Rash (In re Rash)*,[9] the valuation question has been answered.[10] However, the interest rate question continues to vex courts, attorneys, and commentators.[11] The Fifth Circuit recently became embroiled in the interest rate controversy, driving yet another wedge between already split circuits.

Due to the confusion over this issue, it is time for either the Supreme Court or Congress to determine the proper inter-

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individual, under the protection of the court, to develop a plan to repay his debts over a period of time. *Id.* Under a Chapter 13 plan, the debtor is permitted to protect his assets. *Id.* Another benefit of the Chapter 13 plan is that the creditor protects his credit standing better than he would under a Chapter 7. *Id.*

Property subject to a valid security interest is either surrendered to the creditor or a mutually agreeable payment schedule is worked out. ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS 335 (3d ed. 1996). One set of authors, explaining cram down in the Chapter 11 context, opined that the debtor must have its debts reduced and time to pay back extended. MARK S. SCARBERRY ET AL., BUSINESS REORGANIZATION IN BANKRUPTCY 31 (1996). Neither the debtor nor the creditor benefits if the debtor comes out of the reorganization still owing debts. *Id. See also In re* Harris, 94 B.R. 832, 836 (Bankr. D. N.J. 1989) (quoting *In re* Simmons, 78 B.R. 300, 304 (Bankr. D. Kan. 1978) (noting promotion of "fresh start" policy by removing preexisting unsecured debt).

[7] General Motors Acceptance Corp. v. Valenti (*In re* Valenti), 105 F.3d 55, 59 (2d Cir. 1997), *abrogated by*, Associates Commercial Corp. v. Rash, ____ U.S. ____, 117 S. Ct. 1879 (1997). The court adopted the "midpoint" between wholesale and retail value. *In re Valenti*, 105 F.3d at 62-63.

[8] *Id.* at 59.

[9] 117 S. Ct. 1879 (1997).

[10] *In re Rash*, 117 S. Ct. at 1886. The court, reading 11 U.S.C. § 506(a) and 11 U.S.C. § 1325(a)(5)(B) together, determined that "replacement value" is the correct valuation standard for collateral under Chapter 13 plans. *Id.* at 1884. The decision confused commentators as to its application to other chapters of the Bankruptcy Code. Robert F. Mitsch et al., *The Rash Decision: A Question of Value in Context*, 16-Aug AM. BANKR. INST. J. 18, 19 (1997). *See also* Jennifer Gingery, Note, *Replacement Cost to Debtor Determines the Standard For Valuing Collateral Retained Under Cram Down Provisions*, 67 MISS. L.J. 599 (1998) (explaining dynamics of *Rash* decision).

[11] Pearson, *supra* note 4 at 35. There is general consensus that a "market rate" must be applied, but courts do not agree on the rate or how to find it. *Id.*

est rate to charge in Chapter 13 cram down plans. The purpose of this comment is to offer a solution that will be equitable to the parties involved, while maximizing judicial efficiency. To that end, this comment will summarize the rationale and criticisms of each of the approaches used by courts, and will propose a solution to meet both goals.

II. Current Approaches Used in Determining the Proper Cram Down Interest Rate

The objective of 11 U.S.C. § 1325(a)(5)(B)(ii) is to place secured creditors in the same position they would have been had they been allowed to repossess their collateral and sell it at the time of filing.[12] To achieve this goal, secured creditors are entitled to the present value of their allowed secured claim.[13] To obtain present value over the life of a plan, the payments to the secured creditor normally include interest.[14] Much to the consternation of courts, 11 U.S.C. § 1325(a)(5)(B)(ii) gives no guidance as to what the interest rate should be.[15] There is general consensus by courts that a "market rate" should be applied, but the how and why of determining that rate have been more elusive than the Holy Grail.[16] Since Chapter 13 creditors cannot vote to confirm a

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[12] General Motors Acceptance Corp. v. Jones, 999 F.2d 63, 69 (3d Cir. 1993). *See* Timothy D. Moratzka, *Chapter 12 Interest Rate Pegged to Treasury Rate in Second Circuit*, 14-Apr. AM. BANKR. INST. J. 16, 16 (1997) (reporting on *In re Valenti* decision). *See also* Metropolitan Life Ins. Co. v. Murel Holding Corp. (*In re* Murel Holding Corp.), 75 F.2d 941, 942 (2d Cir. 1935) (holding that Chapter 11 creditor was entitled to "indubitable equivalent" of its property interest).

[13] 11 U.S.C. § 506(a) (1994 & Supp. 1996). The allowed secured claim is either the amount owed to the creditor, or the value of the collateral, whichever is less. WARREN, *supra* note 6 at 268.

[14] *Jones*, 999 F.2d at 66. The case involved two debtors, both of whom proposed interest rates lower than those proposed by G.M.A.C. *Id.*

[15] *Id.* The court noted that the concept of present value recognized that money received in the future is less than the same amount received today. *Id.* To determine present value, the court looked to additional value that the secured creditor could generate in the regular course of its business if the plan provided for an immediate payment. *Id.*

[16] Todd J. Zywicki, *Cramdown and the Code: Calculating Cramdown Interest Rates Under the Bankruptcy Code*, 19 T. MARSHALL L. REV. 241, 244 (1994). "[C]ourts 'almost uniformly' agree with use of a market rate of interest as of the

plan, as their Chapter 11 counterparts can,[17] their only protection is judicial oversight.[18] The Circuit Courts of Appeal, exercising such oversight, have adopted three different approaches to the cram down interest rate question.

A. The "Coerced Loan" Approach

1. Rationale

Courts adhering to the "coerced loan" approach[19] take the view that a Chapter 13 cram down is, in essence, forcing the secured creditor to extend a new loan to the debtor.[20] When a

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effective date of the plan as the correct measurement of the cram down interest rate." *Id.* at 245 (citing *In re* Mellema, 124 B.R. 103 (Bankr. D. Colo. 1991). However, that uniformity shatters upon application by courts. *See* Hardzog v. Federal Land Bank of Wichita (*In re* Hardzog), 901 F.2d 858, 860 (10th Cir. 1990) (holding court should use current market rate for similar loans in region). "Almost every court considering the issue has held that the appropriate rate of interest is the market rate of interest on similar loans between typical borrowers and lenders, plus a case-specific premium to compensate for the risk." Financial Sec. Assurance Co. v. T-H New Orleans Ltd. Partnership (*In re* T-H New Orleans Ltd. Partnership), 188 B.R. 799, 808 (Bankr. E.D. La. 1995), *aff'd by,* 116 F.3d 790 (5th Cir. 1997).

Many divergent approaches have been used to determine the market rate. *See In re* Turner, 87 B.R. 514, 518 (Bankr. S.D. Ohio 1988) (using contract rate *after* it was determined that it was below market rate) (emphasis added); *In re* Citrowske, 72 B.R. 613, 617 (Bankr. D. Minn. 1987) (applying interest rate charged by secured creditor); *In re* Fleshman, 82 B.R. 994, 997 (Bankr. W.D. Mo. 1987) (applying legal rate of judgments in absence of evidence concerning market rates).

[17] 11 U.S.C. § 1129(a)(8) (1994 & Supp. 1996).

[18] Alvin C. Harrell, Note, *Recent Bankruptcy Cases Protect Contract Interest Rates*, 49 CONSUMER FIN. L.Q. REP. 422, 422 (1995). One common risk situation is when the creditor loans to a high-risk debtor in return for a higher interest rate. *Id.* In return for making such a loan, the lender receives a higher rate of interest. *Id.* Without proper interest rate protection, the debtor could file Chapter 13 and force a lower interest rate on the creditor through the cram down option. *Id.*

[19] *See In re Hardzog*, 901 F.2d at 860 (applying coerced loan approach in analogous Chapter 12 context); *In re* Mellema, 124 B.R. 103, 107 (Bankr. D. Colo. 1991) (applying coerced loan approach); Dominion Bank v. Casssell (*In re* Cassell), 119 B.R. 89, 93 (Bankr. W.D. Va. 1990) (rejecting cost of funds approach and applying coerced loan to Chapter 13 automobile lien).

[20] C. Frank Carbiener, *Present Value in Bankruptcy: The Search for an Appropriate Cramdown Interest Rate*, 32 S.D. L. REV. 42, 51-52 (1987).

> [D]eferred payment of an obligation under a plan is like a coerced loan

lender makes a loan, it expects to be repaid its principal plus a rate of interest that reflects its service costs, risk, and includes a profit.[21] Additionally, most lenders require an "equity cushion," a loan-to-value ratio of less than one, before they will make most loans.[22] Concomitant with these expectations, and with the statutory objective of putting the secured creditor in the same position in which it would have been, courts following this approach confirm plans that define the market rate as a rate of interest equal to what secured creditors would charge other borrowers for loans of similar character, duration, and amount.[23] Courts determine this rate by looking at interest rates of similar loans made in the region.[24] Included in the determination of this rate is consideration of costs to the lender. Since the cram down is considered a "new" loan, costs of maintaining that loan must also be considered. Courts and commentators broaching the cost subject have not reached consensus on the question of net loan costs increasing or decreasing as the result of cram down.[25] However, one court considering the expense of making the coerced loan concluded that costs saved by the lender would roughly equate with new costs incurred.[26] Moreover, proponents of this ap-

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> and the rate of return with respect to such loan must correspond to the rate which would be charged or obtained by the creditor making a loan to a third party with similar terms, duration, collateral, and risk.

Id. "[T]he court must consider the prevailing market rate for a loan of a term equal to the payout period, with due consideration of the quality of the security and risk of subsequent default." *Id.*

[21] *Jones*, 999 F.2d at 67. The court noted that only by acknowledging the coerced loan aspects of a cram down could the creditor obtain the rate he would voluntarily accept for a similar loan. *Id.*

[22] *See* Zywicki, *supra* note 16 at 260 (noting that additional factors tend to increase cram down risk for creditor).

[23] *Jones*, 999 F.2d at 68. *See also* Carbiener, *supra* note 20 at 51 (noting popular cram down methods).

[24] *Jones*, 999 F.2d at 68. The court noted that the difference between rates charged by the creditor would not materially deviate from comparable loans from its competitors. *Id. See also* Harrell, *supra* note 18 at 423 (reporting on cases utilizing coerced loan approach).

[25] Zywicki, *supra* note 16, at 259-60.

[26] *Jones*, 999 F.2d at 69. The court noted that the rate would "approximately" place the creditor in the same position, but could not replicate it exactly, due to cost factors. *Id.* at 68. G.M.A.C. would incur no new loan costs, but would retain

proach note that the inclusion of the "profit"[27] in the market rate is appropriate, since "profit" is "the cost of deferring present consumption until a later time, and the tradeoff within a creditor's business between alternative methods of financing."[28]

2. *The Contract Rate Rebuttable Presumption*

To reduce litigation costs involved with finding the appropriate market rate for similar loans, the Third Circuit, in *General Motors Acceptance Corp. v. Jones,*[29] after adopting the "coerced loan" approach, implemented the additional procedural requirement that the contract rate on the existing loan between the debtor and creditor is the appropriate starting point for determining the market rate.[30] This procedure imposes a rebuttable presumption that the contract rate is the proper rate under the plan, which may be rebutted by the creditor if interest rates and other costs have increased since

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additional relational costs in dealing with the trustee. *Id.* The court decided that the savings from loan costs and diminution of loan costs would likely result in a net savings for the creditor. *Id.* The court determined that the lack of an "equity cushion" would be an increased cost to the creditor, since it could not mark-up the rate to offset its increased risk. *Id.* These factors combined to make costs of the coerced loan roughly equivalent. *Jones*, 999 F.2d at 69.

[27] Koopmans v. Farm Credit Serv. of Mid-America, 102 F.3d 874, 876 (7th Cir. 1996). Judge Easterbrook noted that normal returns on capital were not economic profit. *Koopmans*, 102 F.3d at 876. "What appears on the books as accounting profit is just the opportunity cost of keeping the firm's assets in this business rather than the next-best alternative". *Id.*

[28] Zywicki, *supra* note 16, at 261. The commentator noted that "profit" is the normal return on capital, and creditors would not make loans in its absence. *Id.* The commentator opined that even with guaranteed payment and zero inflation, the real interest rate would still be positive, to induce the lender to current, rather than future, consumption. *Id.* He concluded that there could be no "profit" "from enticing deferred compensation". *Id. See also Jones*, 999 F.2d at 69 (holding profit should be included in cram down rate).

[29] 999 F.2d 63 (3d Cir. 1993).

[30] *Jones*, 999 F.2d at 70-71. Alphonso Jones financed a pickup truck with G.M.A.C. *Id.* at 65. The contract rate of interest was 11.98%. *Id.* at 66. Jones opted to keep his undersecured truck over the objection of G.M.A.C. *Id.* at 65. Jones's plan called for reducing the interest rate to 10% under his Chapter 13 plan. *Id.* The court addressed the "cost of funds" approach before deciding on the "coerced loan" approach plus the contract rate rebuttable presumption. *Jones*, 999 F.2d at 67, 70-71.

the inception of the loan contract.[31] Conversely, the debtor may rebut this presumption by producing evidence that the creditor's costs have decreased, thus necessitating a lower rate.[32]

3. *Criticism of the Coerced Loan Approach*

Critics of the coerced loan approach note it is not without interpretational problems.[33] For instance, one court[34] held that the appropriate rate was for a similar "workout" loan.[35] Likewise, highly specialized loans often have no "similar market" to which courts can refer.[36] Additionally, critics argue that the determination of the market rate imposes a great time cost on courts, because expert testimony must be heard on comparable rates of other lenders.[37] It has been opined

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[31] *Id.* The court noted its adoption of the "coerced loan" approach best meshed with section 1325(a)(5)(B)(ii). *Id.* at 70. The court also noted the importance of minimizing the expense of getting a Chapter 13 plan conceived and approved. *Id.* Since the contract rate was voluntarily agreed to by the debtor, the court held it was the appropriate place to begin. *Id.* The court held adoption of this beginning point will reduce litigation expenses. *Jones*, 999 F.2d at 70.

[32] *Id.* at 71.

[33] Pearson, *supra* note 4, at 45. Judge Pearson stated that rates determined under the coerced loan theory were based more on intuition than on examination of lending patterns. *Id.*

[34] *See In re* Stratford Assoc. Ltd. Partnership, 145 B.R. 689, 702 (Bankr. D. Kan. 1992) (holding that similar loan was workout loan, not open market loan).

[35] BLACK'S LAW DICTIONARY 1606 (6th ed. 1990). Workout is defined as an "out of court negotiation with creditors whereby a debtor enters into an agreement with a creditor or creditors for a payment or plan to discharge the debtor's debts." *Id.*

[36] *In re* Aztec Co., 99 B.R. 388, 391 (Bankr. M.D. Tenn. 1989).

[37] Pearson, *supra* note 4, at 48. Judge Pearson criticized adherents to the "coerced loan" approach for not particularly identifying a market to which courts could refer. *Id.* "Simply suggesting reference to 'experts' does nothing to expedite a case and provides no meaningful standard to be used to measure the expert testimony at trial or on appeal." *Id.*

Judge Pearson opined that bankruptcy judges should have a familiarity with current interest rates. *Id.* at 46. However, in difficult cases, he stated that the need for expert testimony would turn into a "make work" project for university professors and industry consultants. *Id.* at 48. "In the absence of any identifiable market rate . . . a number of courts have relied on expert testimony to fashion a rate that a hypothetical lender would charge to a hypothetical debtor with the same characteristics for the coerced loan in question." Pearson, *supra* note 4, at 48.

that, in a great many of these cases, the expert will inevitably testify that there is no market because no prudent lender would make such a loan under the terms of the plan.[38]

Perhaps the most vociferous criticism of the coerced loan approach has come from its inclusion of "profit" in the market rate. It has been stated that courts using the coerced loan approach recast present value as protection of the present value of the loan instead of the secured claim.[39] These critics note that the purpose of present value function is to place the secured creditor in the same economic position it would have enjoyed had it repossessed the collateral, not the same position it would have had if it made a new loan.[40] As such, these critics conclude, the value of a secured claim should not include any element of profit.[41]

The use of the contract rate as the appropriate starting point has not escaped criticism. One commentator noted that it was not the legislative intent of Congress to use the contract rate as the rate to charge on cram down plans.[42] In 1983, Congress considered, but did not adopt, adding language to make the contract rate the proper rate on 11 U.S.C. § 1325(a)(5)(B)(ii) installment cram down plans.[43] The fact

that *Jones* did not consider legislative intent could place the long-term survival of its holding in jeopardy if it is challenged.

B. The "Cost of Funds" Approach

Another popular theory with bankruptcy courts is the "cost of funds" approach.[44] While lower bankruptcy courts have adopted this approach as a substitute for the "coerced

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[38] *Id.* Inevitably, the creditor's expert will testify that no lender would make the proposed coerced loan, unless it was at such a high rate as to make the plan itself unfeasible. *Id.*

[39] *In re* Dingley, 189 B.R. 264, 269 (Bankr. N.D. N.Y. 1995). *See also In re* Hudock, 124 B.R. 532, 534 (Bankr. N.D. Ill. 1991) (stating that Bankruptcy Code protects creditor's interest in collateral, not profit it anticipated on loan).

[40] *In re Valenti*, 105 F.3d at 63-64.

[41] *Id.* at 64.

[42] Moratzka, *supra* note 12, at 16.

[43] H.R. 1085, 98th Cong. § 19(2)(A) (1983).

[44] *See, e.g., In re* Jordan, 130 B.R. 185, 192 (Bankr. D. N.J. 1991) (adopting cost of funds approach).

loan" model, no circuit court has adopted it in the Chapter 13 context.[45] This approach seeks to put the creditor in the same position he would have been had he repossessed the collateral by determining the rate at which the creditor borrows capital.[46]

1. Rationale

The theory works as follows: since the creditor in a cram down is deprived of the opportunity to sell the collateral and reinvest the proceeds, it is only just that the creditor receive the same rate of interest necessary to borrow the same amount.[47] The creditor could then use the borrowed funds to make new loans at current market rates.[48] Proponents note that this approach fully recompenses the creditor for any additional interest costs incurred due to deferral of payments under the plan, thus the creditor is not harmed by the deferral.[49] Advocates of the theory argue that the secured creditor is entitled only to the time value of money, which is received by getting a rate equal to the costs for a creditor to replace funds.[50] Additionally, there is less need for any cost allowance because a bankruptcy court has determined that the plan

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[45] Zywicki, *supra* note 16, at 252. Circuit courts rejected the approach in all cases considered, but lacked uniform rationale. *Id.*

[46] *Jones*, 999 F.2d at 67.

[47] *Id. See also* Koopmans v. Farm Credit Serv. of Mid-America, 102 F.3d 874, 876 (7th Cir. 1996) (explaining advantages of cost of funds approach).

[48] *In re Valenti*, 105 F.3d at 63.

[49] Zywicki, *supra* note 16, at 254. One treatise noted it is incorrect for secured creditors to receive a rate of interest that compensates them for profit and the cost of a new loan transaction, as the coerced loan approach does. 8 COLLIER ON BANKRUPTCY, ¶ 1325.06[3][b], 1325-36 (Lawrence P. King ed., 15th ed. rev. 1997). The "coerced loan" approach also conflicts with other Code provisions, such as section 1325(a)(4), which provides for present value interest to unsecured creditors protected by the "best interests of creditors" test. *Id.* The "best interests" test requires that creditors in reorganization plans receive at least what they would have in a Chapter 7 liquidation. WARREN, *supra* note 6, at 683.

[50] Zywicki, *supra* note 16, at 254. Use of the "cost of funds" approach will be beneficial to debtors because the determinant "cost" is the creditor's, not the debtor's. *Id.* Since creditors will frequently be commercial banks or government entities, they usually borrow at a lesser cost than do individual borrowers. *Id.* Consequently, if the "cost of funds" approach is used in the cram down, the debtor will be able to decrease the amount of interest on her loan. *Id.*

is feasible. Because the secured creditor may seek adequate protection at any time, there is less risk of default and its associated costs.[51]

Supporters of this approach, in a direct reproach to supporters of the coerced loan theory, argue that allowance of costs of a new loan and of "profit" should not be considered in determining the proper interest rate.[52] In their opinion, any allowance for these two economic forces creates a windfall not contemplated by the framers of the Bankruptcy Code.[53] Proponents of this approach do not see the present value requirement as a substantive protection of the creditor's rights in cram down, but instead as a "procedural instruction for the mechanics of discounting a substantive claim defined independently from the present value requirement."[54]

2. *Criticism of the "Cost of Funds" Approach*

Critics of the "cost of funds" approach note that it falls short of the statutory objective of adequately compensating the secured creditor under 11 U.S.C. § 1325(a)(5)(B)(ii).[55] Since the creditor must "both absorb the costs of deferred payment and continue a lending relationship with the debtor past the point contemplated under the original agreement," the secured creditor will be undercompensated.[56] One commenta-

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[51] *Id.* at 260. An additional factor is that the creditor gets to retain its lien. *Id.* Furthermore, the use of discovery, testimony under oath, and expert witnesses produce superior information, which denotes better knowledge of the characteristics of the property. *Id.* Finally, the creditor already knows the operating history of the property, thus it has an enhanced basis for predicting future performance. *Id.*

[52] *Id.*

[53] *Id.* Were the collateral surrendered, neither profit nor new loan costs would be incurred. *Id.* Therefore, any rate which builds in new loan cost or profit does not meet the statutory objective. *Id.* The author noted that the "cost of funds" approach was not inconsistent with the legislative history. *Id.* at 253.

[54] *Id.* at 256. The author noted that advocates of the "cost of funds" approach argue that the term "allowable claim" must be read separately from the present value requirement. *Id.*

[55] *Jones*, 999 F.2d at 67. *See also* Zywicki, *supra* note 16, at 259 (noting that exclusion of transaction costs and "profit" undercompensates creditor).

[56] *Jones*, 999 F.2d at 67. "Profit" is the same as a normal return on capital, which must be earned or no loans would be made. Zywicki, *supra* note 16, at

tor noted that disallowing transaction costs was incorrect because there is no evidence that transaction costs are lessened when a secured loan becomes a cram down loan.[57] Finally, a creditor's cost of funds is not readily and easily ascertainable[58] and the evidentiary costs of making such a determination are extremely high.[59]

C. The "Treasury Rate" Approach

1. Rationale

A third approach, adopted in *General Motors Acceptance Corp. v. Valenti*,[60] is to fix the interest rate on Chapter 13 cram downs to the rate on a United States Treasury instrument with an equivalent maturity to the repayment schedule, plus a risk premium.[61] Proponents of this approach argue

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261. "Profit" in reality is the real interest component of the market rate, so any proper cost of capital analysis considers it. *Id.* "Courts that reduce market rates by the 'profit' element are indirectly denying the creditor compensation for the court's taking of the creditor's current use of funds." Waltraud S. Scott, *Deferred Cash Payments to Secured Creditors in Cram Down of Chapter 11 Plans: A Matter of Interest*, 63 WASH. L. REV. 1041, 1050 (1988).

The "cost of funds" approach also increases risk in the sense that there is no compensation for the statutorily imposed loan to value ratio of one to one. Zywicki, *supra* note 16, at 260. Furthermore, there is no empirical evidence demonstrating that risk of default is lessened in cram down plans. *Id.*

[57] *Id.* The commentator noted that it is unlikely that any administrative costs are lessened under this approach, and, in fact, would probably increase. *Id.* at 259. Any transaction cost savings from not actually having to make a new loan is offset by legal, managerial, and clerical costs necessary for monitoring the "new" loan under the bankruptcy plan. *Id.*

[58] *Id.* at 259-60.

[59] *In re Valenti*, 105 F.3d. at 64.

[60] 105 F.3d 55 (2d Cir. 1997), *abrogated by*, Associates Commercial Corp. v. Rash, ____ U.S. ____, 117 S. Ct. 1879 (1997).

[61] *In re Valenti*, 105 F.3d at 64. G.M.A.C. financed a car for the debtor Valentis. *Id.* at 58. Approximately a year-and-a-half later, the Valentis filed a Chapter 13 petition. *Id.* The Valentis opted to keep their undersecured car over G.M.A.C.'s objection. *Id.* G.M.A.C. proposed a plan rate of 15.78%, which was the rate charged by G.M.A.C. in the Valenti's region at the time of confirmation. *Id.* at 59. The court rejected both the "cost of funds" and "coerced loan" approaches in adopting its "treasury rate plus risk premium" approach. *In re Valenti*, 105 F.3d at 64. *See* Moratzka, *supra* note 12, at 16 (analyzing decision in *In re Valenti*).

See also United States v. Doud, 869 F.2d 1144, 1146 (8th Cir. 1989) (apply-

that it is easily applied, objective, and will lead to uniform results.[62] Additionally, the tie-in to the treasury rate will ensure the rate is responsive to current market conditions.[63] The court listed three factors to consider in setting the "risk premium": (1) the debtor's circumstances; (2) the debtor's prior credit history; and (3) the viability of the creditor's plan.[64] The court then held that a one percent to three percent range would be considered reasonable.[65]

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ing two percent risk factor in Chapter 12 context); *In re* Cansler, 99 B.R. 758, 762 (Bankr. W.D. Ky. 1989) (upholding bankruptcy judge's determination of interest rate, but noting "[d]ivining the current market rate when no real market for these loans is truly an inexact science."); *In re* Fisher, 29 B.R. 542, 551 (Bankr. D. Kan. 1983) (applying risk factor); DOUGLAS G. BAIRD ET AL., CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 1184 (2d ed. 1990) (explaining determination of risk premium rates in Chapter 12 context).

[62] *In re Valenti*, 105 F.3d at 64. The court noted that the risk-free rate had been set between one and three percent in lower courts that had used the treasury rate plus risk premium. *See, e.g., In re Lassiter*, 104 B.R. 119 (Bankr. S.D. Iowa 1989) (applying one percent risk factor over treasury rate).

[63] *In re Valenti*, 105 F.3d at 64. *See also* Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enter (*In re* Briscoe Enter), 994 F.2d 1160, 1169 (5th Cir. 1993) (noting ease of application of treasury rate), *cert. denied*, 510 U.S. 992 (1993); *In re* Wynnefield Manor Assoc., 163 B.R. 53, 60 (Bankr. E.D. Pa. 1993) (noting ease of application of treasury rate).

[64] *In re Valenti*, 105 F.3d at 64. *See also* United States v. Southern States Motor Inns, Inc. (*In re* Southern States Motor Inns, Inc.), 709 F.2d 647, 651 (11th Cir. 1983) (using "risk free" rate in determining payments to Internal Revenue Service under Chapter 11); *In re* IPC Atlanta Ltd. Partnership, 142 B.R. 547, 557 (Bankr. N.D. Ga. 1992) (using "risk free" rate in Chapter 11 context); *In re* Oaks Partners, Ltd., 135 B.R. 440, 446 (Bankr. N.D. Ga. 1991) (using "risk free" approach in determining time value of money); *In re* Computer Optics, Inc., 126 B.R. 664, 672 (Bankr. D. N.H. 1991) (placing primary focus on determining appropriate "risk free" rate in Chapter 11).

[65] *In re Valenti*, 105 F.3d at 64. Although the court held the appropriate risk premium was one-to-three percent, it left the determination to the bankruptcy courts. *Id.* The court noted that if the parties could not agree on an acceptable risk premium, then the bankruptcy court could conduct a hearing to determine that sole issue. *Id. See In re* Collins, 167 B.R. 842, 847 (Bankr. E.D. Tex. 1994) (applying 2.3% risk premium); *In re* DeMaggio, 175 B.R. 144, 152 (Bankr. D. N.H. 1994) (applying one percent risk premium); *In re* Mayer Pollock Steel Corp., 174 B.R. 414, 419 (Bankr. E.D. Pa. 1994) (applying 3% risk premium); *In re* Fisher, 29 B.R. 542, 551 (Bankr. D. Kan. 1983) (applying one percent risk premium); *In re* Levine, 10 B.R. 168, 170 (Bankr. D. Mass. 1981) (applying one percent risk premium).

2. *Criticism of the "Treasury Rate" Approach*

The treasury rate approach, at first glance easier to apply, is not without its weaknesses.[66] First, the risk premium question remains fact sensitive, which in the long run will make adjudication of the issue no less time-consuming to the courts. Second, and most important, the suggested one percent to three percent cap on a risk-free rate works a grave injustice to secured creditors. The treasury rate, which is a risk free rate, is not given to even the most creditworthy debtors. Adding only one to three percent to a risk-free United States Treasury instrument, depending on the particular circumstance of the debtor, does not account for any of a creditor's additional costs and may very well still not reflect the risk to which the creditor is subjected. The potential for undercompensation generated by this approach greatly undermines the statutory objective of putting the secured creditor in the same position he would have been had he been able to repossess the collateral at the time of bankruptcy.[67]

D. In re Smithwick *and the Split in the Circuits*

The Fifth Circuit entered the fray with its decision in *Green Tree Financial Servicing Corp. v. Smithwick (In re Smithwick)*.[68] Noting that the Chapter 13 cram down interest rate question was one of first impression, the court relied on

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[66] *See* Financial Sec. Assurance, Inc. v. T-H New Orleans Ltd. Partnership (*In re* T-H New Orleans Ltd. Partnership), 188 B.R. 799, 808 (Bankr. E.D. La. 1995) (declining to use treasury rate in Chapter 11 cram down), *aff'd by* 116 F.3d 790 (5th Cir. 1997).

[67] *In re* Neff, 89 B.R. 672, 679 (Bankr. S.D. Ohio 1988), *amended by* 96 B.R. 800 (Bankr. S.D. Ohio 1989). The "treasury rate" approach does not allow courts adequate latitude for special or unusual circumstances. *In re* Neff, 89 B.R. at 679. Further, such an approach is not specific to certain market segments. *Id.* Adoption of this approach forces courts to "ascribe rate increments for future risks to debtors and collateral and to forecast future events with a precision which this Court doubts its ability to accurately assess." *Id.* The court felt the subjectivity element was too high under this approach. *Id. See also In re* Busconi, 147 B.R. 54, 55 (Bankr. D. Mass. 1992) (holding in Chapter 11 context, use of "risk free" rate was "patently unfair" to secured creditors and noting that undersecured creditors should not be denied compensation for profit and risk of nonpayment).

[68] 121 F.3d 211 (5th Cir. 1997).

past Chapter 11 cram down cases which held the contract rate was appropriate.[69] The court compared and contrasted the "cost of funds" and the "coerced loan" approaches[70] before adopting the "coerced loan" approach, along with the contract rate rebuttable presumption found in *General Motors Acceptance Corp. v. Jones*.[71] The court noted that *Jones* was consistent with its holding in its Chapter 11 cases,[72] and it provided the needed balance between judicial economy and the costs and risks of "coerced" credit.[73]

The circuit courts are split three ways on the interest rate question. The Third, Sixth, and, as a result of *In re Smithwick*, the Fifth Circuits follow the "coerced loan" theory. The Seventh Circuit (in the Chapter 12 context) and several lower courts follow the "cost of funds" approach.[74] Finally, the Second Circuit, as a result of *In re Valenti*, follows the "treasury rate" approach.

III. An Alternate Approach

Cases, treatises, and commentaries on Chapter 13 jurisprudence reflect two policy goals in attaining the proper 11 U.S.C. § 1325(a)(5)(B)(ii) interest rate. First, the rate should place the secured creditor in at least the same position in which it would have been had it repossessed the collateral. Second, the rate should be ascertainable in such a way as to promote judicial economy. While the "coerced loan"/contract rate rebuttable presumption approach championed by the Third and Fifth Circuits represents a growing trend, the presence of divergent approaches demonstrates a lack of needed

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[69] *See In re T-H New Orleans Ltd. Partnership*, 116 F.3d at 800 (affirming lower court's use of contract interest rate while noting there is no "particular formula"); *In re* Briscoe Enter, 994 F.2d 1160, 1169 (5th Cir. 1993) (noting that contract rate was good estimate of market rate).

[70] *In re Smithwick*, 121 F.3d at 213-14.

[71] *Id.* at 214. The court adopted the *Jones* rationale in totality. *Id.*

[72] *Id.*

[73] *Id.* at 215. The court noted that finding the correct rate remains a factual question. *Id.* The court observed that the standard of review is for clear error. *Id.*

[74] *See Koopmans*, 102 F.3d at 876 (utilizing "cost of funds" approach in Chapter 12 context).

consensus on the issue.[75]

While the weaknesses and strengths of each approach mentioned in this comment are indeed credible, there is an alternate approach that fulfills the policy goals mentioned previously. Either the Supreme Court or Congress should adopt a prime rate[76] plus risk premium interest rate for Chapter 13 plans.[77] The prime rate is determined from the Federal Funds rate[78] and the Federal Reserve Discount[79] rate.[80] To reflect the inherent risk present in loans to even

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[75] *See* Harrell, *supra* note 18, at 423.

[76] Prime rate is defined as "[t]he lowest rate of interest from time to time charged by a specific lender to its most credit worthy customers for short term unsecured loans. BLACK'S LAW DICTIONARY 1191 (6th ed. 1990). "The prime rate is often used as the floor or base rate for setting interest rates on other loans." *Id.*

[77] Some bankruptcy courts have used the prime rate as the cram down rate, but none have used it in conjuction with a presumptive risk premium added. *See, e.g.*, *In re* Wilmsmeyer, 171 B.R. 61, 64 (Bankr. E.D. Mo. 1994) (holding that prime rate, set by local rule, plus 3.5% was appropriate cram down rate); United Carolina Bank v. Hall, No. 92-170-CIV-5-F, 1992 WL 499541, at *4 (E.D.N.C. May 20, 1992) (noting that other courts had used prime rate); *In re* Jordan, 130 B.R. 185, 192 (Bankr. D. N.J. 1991) (holding prime rate is presumptive best indicator of market rate but declining to add risk premium); *In re* Hudock, 124 B.R. 532, 534 (Bankr. N.D. Ill. 1991) (applying prime rate as of case commencement date). *But see In re* Hollins, 185 B.R. 523, 525 (Bankr. N.D. Tex. 1995) (declining to use prime rate); *In re* Galvao, 183 B.R. 23, 26 (Bankr. D. Mass. 1995) (declining to use prime rate and opting for case-by-case determination).

[78] The Federal Funds rate is defined as "the interest rate charged on loans made between banks that are members of the Federal Reserve System." JEFFREY B. LITTLE & LUCIEN RHODES, UNDERSTANDING WALL STREET 126 (3d ed. 1991). The Federal Funds rate is considered an important part of the money market. *Id.*

[79] The Federal Reserve Discount rate is defined as the "rate that member banks pay on funds borrowed from their Federal Reserve Bank." LITTLE & RHODES, *supra* note 78, at 126.

[80] David B. Hilder, *Nation's Biggest Banks Lower Prime to 9.5%*, WALL ST. J., Jan. 3, 1991, at A2.

> The drop in the prime rate, a benchmark that determines the rates charged on loans to most small and medium-sized businesses and some individuals, had been widely anticipated since the Federal Reserve Board lowered two key short-term rates about two weeks ago, citing concerns about weakness in the economy.

Id. "The federal funds rate is one of the two key rates that the Fed lowered . . . ." *Id.* "The other is the discount rate, the rate the Fed charges on short-term loans to banks . . . ." *Id.*

"The federal government plays a major role in the establishment of the prime rate and, thus, the general level of retail interest rates." ROBERT W. HAMILTON,

the most creditworthy of customers, the prime rate has a risk premium added, therefore, the prime rate is always greater than the Federal Funds and Federal Reserve Discount rates.[81] By using the prime rate, as opposed to the U.S. Treasury rate, as the basis for the Chapter 13 cram down rate, the concept of risk is already considered. Further, courts should be empowered to add an additional variable risk premium to the prime rate.[82] Adding this variable premium will allow courts, if applicable, to account for the creditor's additional costs, lack of equity cushion, and the risk that the creditor will default while the collateral depreciates.

Judicial economy will be served under this approach if the Supreme Court or Congress will allow courts to set, by local rule, a presumptive risk premium rate that will adequately place the creditor in a position to be compensated for the risk of non-payment inherent in a Chapter 13 bankruptcy. Allowing the presumptive risk premium to be set by local rule will ensure that market conditions of the particular area, as opposed to a national standard, will be used to determine the rate. Local bankruptcy judges are in an ideal position to set this rate because they have knowledge of local credit market conditions. Additionally, by making the risk premium a rebuttable presumption, if the combination of the prime rate plus the risk premium is unreasonably high or low, the risk premium portion may be challenged by either party.

Under this approach, creditors would be placed in a comparable position as if they had been allowed to repossess and sell the collateral. They will not only be able to receive the

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MONEY MANAGEMENT FOR LAWYERS AND CLIENTS § 7.16 at 116 (1993). "Acting through the Federal Reserve System, it uses interest rates and the supply of money in commercial banks as devices to fight inflation and unemployment and to encourage a high level of economic activity." *Id.* The discount rate is the most visible of many contributors to determination of the prime rate. *Id.* at 117.

[81] "The relationship between the discount rate and the prime rate can be most simply visualized as the former being the wholesale rate and the latter being the retail rate for money." HAMILTON, *supra* note 80, at 117. The spread between the discount rate and prime rate generally runs at two percent.

[82] *But see In re Jordan*, 130 B.R. at 192 (declining to add risk premium to prime rate because it required excessive judicial speculation, empirical demonstrations not always available, and consideration of risk of default).

value of the allowed claim, but they will also receive a rate of interest competitive in the current local market and a rate that compensates them for their costs and risks. Furthermore, bankruptcy courts will benefit because the prime lending rate is easily ascertainable with minimal research.[83] The only matter to be resolved in court—once the initial presumptive risk premium is set—will be the deviance from the risk premium.

Critics of this approach will no doubt point to two weaknesses, both addressing the variable risk premium and both coming from the judicial economy prong. First, allowing the risk premium to be set by local rule will not serve judicial economy because it will force local judges—who are not business people—to become experts on local credit market conditions. Second, mandating a rebuttable presumption on the risk premium will encourage litigation rather than decrease it because the parties will see an advantage in using the court to settle disputes over the proper risk premium to charge. As to the first argument, no one is in a better position than the bankruptcy judge to ascertain current market conditions because judges see the terms of local loans on a daily basis. As to the second argument, the parameters of the risk premium will be set by the court, so the "dickering range" will be limited. This should decrease costs to the parties and serve as a disincentive to litigate, and encourage settlements.

Due to the conflict between circuits, it is of critical importance that the Supreme Court or Congress resolve this issue. Resolution of this conflict will promote the policy of judicial efficiency by giving courts and attorneys guidance on this foundational issue in Chapter 13 plans.

Matthew Y. Harris

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[83] The prime rate is published weekly in business sections of major newspapers, including the *Wall Street Journal*.

RECENT DECISIONS

AUTOMOBILE INSURANCE—UNINSURED MOTORISTS—PUBLIC POLICY DEMANDS THAT ANTI-STACKING PROVISIONS BE HELD VOID AS AGAINST PUBLIC POLICY*

On July 18, 1993, an uninsured motorist negligently hit the insured, Dorothy Ferguson, while she was riding as a passenger in her Cadillac Seville.[1] At the time of the accident, a single policy issued by the United States Fidelity and Guaranty Company (USF&G) insured Ferguson's Cadillac and two other vehicles.[2] USF&G declined to stack uninsured motorist (UM) coverages on the three vehicles, maintaining that, under

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* Ott and Purdy Case Note Award winner, presented annually by the Jackson, Mississippi law firm of Ott & Purdy, Ltd., in recognition of outstanding legal research and writing in *The Mississippi Law Journal* Case Note Competition.

[1] United States Fidelity & Guar. Co. v. Ferguson, No. 94-CA-01283-SCT, 1997 WL 426261 (Miss. July 31, 1997). Allstate insured the motorist under a policy with a liability limit of $25,000. *Ferguson*, 1997 WL 426261, at *1. Allstate paid the $25,000 limit to Ferguson. *Id.* However, Ferguson incurred more than $100,000 in bodily damages. *Id.*

[2] *Ferguson*, 1997 WL 426261, at *1. The policy had a $25,000 limit of liability for uninsured motorist (UM) coverage on each vehicle. *Id.* The policy charged a single premium for all three cars for UM coverage, but charged separate premiums for each car's liability and property damage coverage. *Id.*

Mississippi law, it need not aggregate the coverages because the policy contained an unambiguous anti-stacking provision and the total UM coverage exceeded the statutory minimum.[3]

Seeking to have the three UM coverages aggregated, Ferguson filed a complaint for declaratory judgment in circuit court.[4] After discovery, both Ferguson and USF&G moved for summary judgment.[5] The circuit judge granted Ferguson's motion for summary judgment[6] and ordered USF&G to pay stacked coverage, less amounts previously paid.[7] On appeal, the Mississippi Supreme Court held: Affirmed in part, reversed and rendered in part.[8] The court held that anti-stacking clauses are unenforceable as against public policy, regardless of the number or amount of premiums paid for the UM coverage.[9]

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[3] *Id.* USF&G asserted that Mississippi case law allowed it to limit stacking when its policy contained an unambiguous anti-stacking provision and the total UM coverage exceeded the statutory minimum of $10,000 per car. *Id.* USF&G also claimed that stacking was impermissible in excess of the amount of liability coverage under the policy. *Id.* at *5. USF&G claimed that it owed Ferguson $10,000 for each car, less the credit offset of Allstate's $25,000 payment. *Id.*

[4] *Id.* at *2. Ferguson filed the complaint in Lafayette County Circuit Court. Id.

[5] *Id.* Ferguson alleged USF&G previously paid stacked UM coverage and should not be allowed to change its policy without notifying its insureds. *Id.*

[6] *Ferguson*, 1997 WL 426261, at *2. The court ordered USF&G to pay Ferguson $25,000 for each of the three cars, less $5,000 previously paid. *Id.* The court did not allow a credit set-off for the $25,000 paid to Ferguson by Allstate. *Id.*

[7] *Id.* The court denied USF&G's motion for summary judgment. *Id.*

[8] *Id.* at *6. The Mississippi Supreme Court affirmed in part and reversed and rendered in part because the circuit court properly ordered USF&G to stack UM coverage, but improperly refused to allow a credit set-off for sums paid by Allstate. *Id.*

[9] *Id.* The court reasoned that public policy mandated stacking of UM coverage regardless of the number of premiums paid or the amount of liability coverage. *Id.* The court also held that the UM statute authorized an insured "to demand UM coverage up to the amount of his liability coverage limit," but the court stated that the statute did not prevent an insurer and its insured from agreeing to a larger amount of UM coverage. *Id.* In the court's final holding, Justice Sullivan, speaking for the majority, stated that it was not against public policy for an insurer to include in its policy an offset clause "to recover the portion of damages for which the tortfeasor is insured." *Id.*

I. Related Law

Since the enactment of the Mississippi Uninsured Motorist Act[10] in 1967, uninsured motorist (UM) coverage[11] provided recovery to insured persons injured by uninsured motorists in Mississippi.[12] Under certain circumstances, courts have ordered insurers to "stack" UM coverages from one or more vehicles or policies.[13]

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[10] Miss. Code Ann. §§ 83-11-101 to -111 (1972). The Act provides that all automobile insurance policies issued must contain provisions undertaking to pay the insured all sums which he is legally entitled to recover from the owner or operator of an uninsured motor vehicle. *Id.*

[11] Black's Law Dictionary 1532 (6th ed. 1990). Uninsured motorist coverage is defined as "[p]rotection. . . against bodily injury inflicted by an uninsured motorist, after the liability of the uninsured motorist has been established." *Id.*

[12] Thiac v. State Farm Mut. Auto. Ins. Co., 569 So. 2d 1217, 1219 (Miss. 1990). In order for a claimant-insured to collect from an uninsured motorist carrier, the claimant must prove the applicable UM policy covered him as an insured, the tortfeasor's vehicle met the requirements under the policy or the UM statute for being defined as uninsured, the negligence of the uninsured motorist proximately caused his injuries, and the uninsured motorist was legally responsible for payment of damages to him. J. Price Coleman, *Analysis of Mississippi's Uninsured and Underinsured Motorist Statute and Standard Insurance Policy Language, in* Mississippi Uninsured and Underinsured Motorist Coverage Issues 1, 8 (1987). The insured-claimant has the burden of proving each element. State Farm Fire & Cas. Co. v. Wightwick, 320 So. 2d 373, 375 (Miss. 1975).

The 1980 amendment to the Act added to the definition of 'uninsured motor vehicle' any insured vehicle "when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage." Miss. Code Ann. § 83-11-103(c)(iii) (Supp. 1987). The amendment allows an insured to protect himself to whatever extent he deems appropriate. *Thiac*, 569 So. 2d at 1219. Previously, Mississippi law did not include in the definition of uninsured motorist the motorist who was underinsured by the tortfeasor's liability policy. Dixie Ins. Co. v. State Farm Mut. Auto. Ins. Co., 614 So. 2d 918, 920 (Miss. 1992). An underinsured motorist is one whose liability policy limits are in amounts less than the limits of the UM coverage purchased by the injured driver. *In re* Guardianship of Lacy v. Allstate Ins. Co., 649 So. 2d 195, 197 (Miss. 1995). Because Mississippi law now includes the underinsured motorist in the definition of uninsured motorist, the rules applicable to uninsured motorist coverage also apply to underinsured motorist coverage. Richard T. Phillips, *Underinsured Motorist Coverage in Mississippi*, 3 Miss. C.L. Rev. 65, 73 (1982).

[13] 7 Am. Jur. 2D *Automobile Insurance* § 329 (1980). "'Stacking' is the aggregation of UM coverage under different policies or on different vehicles to afford the insured recovery for all his damages." 46 C.J.S. *Insurance* § 1152 (1993). Under Mississippi law, stacking has not been required by statute but has been

A. Stacking of UM Coverages Under Multiple Policies

The Mississippi Supreme Court first addressed the issue of whether an insured could recover under two UM policies for damages sustained in an accident with an uninsured motor vehicle in *Harthcock v. State Farm Mutual Automobile Insurance Co.* .[14] In *Harthcock*, the insured-passenger sought recovery from both her husband's UM carrier and the driver's UM carrier for damages sustained in an accident.[15] The lower court held the plaintiff's husband's insurer liable but dismissed the driver's insurer.[16] The Mississippi Supreme Court, reasoning that the UM statute must be interpreted liberally, held that the UM coverage of each policy of liability insurance was available to the insured until all sums which he would have been entitled to recover from the uninsured motorist have been collected.[17]

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mandated in cases where an insurance policy was ambiguous on whether multiple premiums were being charged. Thomas v. Allstate Ins. Co., No. CIV.A.3:93-CV-601BN, 1997 WL 401257, at *7 (S.D. Miss. July 9, 1997).

[14] 248 So. 2d 456 (Miss. 1971).

[15] *Harthcock*, 248 So. 2d at 457. The trial court found the plaintiff's damages to be $14,500. *Id.* at 458. Plaintiff settled with the driver of the underinsured vehicle for $4500. *Id.* at 457.

[16] *Id.* at 458. The circuit court stated that the plaintiff's husband's insurer should be credited with the $4500 paid by the other driver's liability insurer. *Id.*

[17] *Id.* at 461. The court reasoned that the existence of one driver's liability insurance does not extinguish the amount of the UM coverage provided by the two UM carriers. *Id.* at 459. One purpose of UM coverage is to provide the insured a means of collecting sums for bodily injures caused by an accident arising out of the ownership or use of an uninsured automobile. Hodges v. Canal Ins. Co., 223 So. 2d 630, 634 (Miss. 1969). The Act must be interpreted liberally to meet this purpose. Stevens v. United States Fidelity & Guar. Co., 345 So. 2d 1041, 1043 (Miss. 1977).

Several courts have held that an insured-claimant may stack his UM coverage under different policies to determine the amount of available coverage. St. Arnaud v. Allstate Ins. Co., 501 F. Supp. 192, 194 (S.D. Miss. 1980). *See* Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 535, 536 (Miss. 1975) (allowing stacking of coverage from three UM policies on three vehicles owned by insured).

B. Stacking of UM Coverages Under a Single Policy Insuring Multiple Vehicles

The Mississippi Supreme Court first addressed the issue of whether an insured is entitled to stack UM coverages under a single policy insuring multiple vehicles in *Talbot v. State Farm Mutual Automobile Insurance Co.* .[18] In *Talbot*, the insured sought to recover stacked benefits under his UM policy for damages sustained in an automobile accident with an uninsured motorist.[19] At trial, the lower court entered a judgment denying aggregation of the coverages and limiting the insurer's liability to the amount specified by financial responsibility law.[20] On appeal, the supreme court held that coverage could not be stacked because the policy's anti-stacking provision was clear and unambiguous, and the insured could recover no more than the amount of coverage provided under financial responsibility law.[21]

In *Government Employees Insurance Co. v. Brown*,[22] the Fifth Circuit Court of Appeals presented to the Mississippi Supreme Court the certified question of whether insureds are entitled to aggregate coverages contained in one policy insur-

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[18] 291 So. 2d 699 (Miss. 1974), *abandoned by*, 446 So. 2d 1002 (Miss. 1984).

[19] *Talbot*, 291 So. 2d at 700. The insured's damages for bodily injuries totaled $9,800, including $652.72 in medical expenses. *Id.*

[20] *Id.* at 702. The court also refused to offset the amount payable under the plaintiff's medical expense coverage against his recovery under his UM coverage. *Id.*

[21] *Id.* at 703. The court reasoned that the liability-limiting clause was consistent with the UM statute and could be no more unambiguous. *Id.* at 701. The court expressly declined to address whether the payment of multiple premiums affected the issue of stacking. *Id.* at 702.

Three years after the court rendered its opinion in *Talbot*, the supreme court addressed a similar issue in another case. Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1380 (Miss. 1977). In *Bridges*, however, the court stated that stacking of UM coverages on multiple vehicles covered under a single policy may be permitted when the policy is ambiguous or when separate premiums are paid. *Bridges*, 350 So. 2d at 1380. The court cautioned that the charging of a separate premium is not controlling in the determination of whether the insured is entitled to aggregated coverage, but merely raises a presumption of aggregation. *Id.* at 1381.

[22] 446 So. 2d 1002 (Miss. 1984).

ing multiple vehicles for which separate premiums are paid.[23] In *Brown*, the insured sought to recover stacked UM coverages for bodily damages resulting from the negligence of an uninsured motorist.[24] The court recognized that under UM case law, the aggregation of claims has been permitted in some situations to enable an insured to recover the entire amount of his damages.[25] The court, reasoning that public policy should

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[23] *Brown*, 446 So. 2d at 1003. The court was to answer a question of law regarding a discrepancy between two cases that addressed stacking in a single UM policy insuring multiple vehicles. *Id.* at 1004. In *Talbot*, a 5-4 decision, the court held that coverage cannot be stacked when a policy contains a clear and unambiguous anti-stacking provision. *Talbot*, 291 So. 2d at 702. While in *Bridges*, the court held, under essentially the same circumstances, that coverage could be aggregated. *Bridges*, 350 So. 2d at 1379.

Some jurisdictions have ordered stacking of UM coverages when the language of the policy was ambiguous, even though a single policy covered several vehicles. 8C JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 5107 (1981).

[24] *Brown*, 446 So. 2d at 1003. The insured paid separate premiums for UM coverage on each of the automobiles. *Id.* at 1006. A majority of jurisdictions have permitted stacking of coverages when separate premiums were paid. J. Thomas Longino, IV, Case Note, 64 MISS. L.J. 835, 840 (1995).

[25] *Brown*, 446 So. 2d at 1004. Several jurisdictions have addressed whether an insured may stack coverages of multiple vehicles when only one premium is paid for such coverage. John F. Emerson & Thomas A. Leggette, *Recent Developments in Automobile Law*, 32 TORT & INS. L.J. 203, 211-12 (1997).

One court stated that its rule allowing companies to limit stacking does not apply when used to circumvent the state's public policy permitting an insured to recover his "reasonable expectations." Western Reserve Mut. Cas. Co. v. Holland, 666 N.E.2d 966, 968 (Ind. 1996). The payment scheme of premiums has been considered to be a significant factor by many courts in determining whether to permit stacking in a particular case. Janet Boeth Jones, J.D., Annotation, *Combining or "Stacking" Uninsured Motorist Coverage Provided in Single Policy Applicable to Different Vehicles of Individual Insured*, 23 A.L.R.4TH 12, 18 (1981).

The Mississippi Supreme Court previously held that as long as the required statutory minimum was upheld and the language and intent of the policy was clear, insurers had an essentially unconditional right to contractually limit or prohibit stacking. State Farm Mut. Auto. Ins. Co. v. Kuehling, 475 So. 2d 1159, 1163 (Miss. 1985). *See* State Farm Mut. Auto. Ins. Co. v. Nester, 459 So. 2d 787, 789 (Miss. 1984) (allowing insurer to limit stacking when contractual requisites were deemed met); State Farm Mut. Auto. Ins. Co. v. Talley, 329 So. 2d 52, 54 (Miss. 1976) (allowing liability-limiting policy provision because it was clear and did not diminish coverage required by statute). When an insurer requires its insured to endorse a liability-limiting clause contrary to law and statute, however, the clause is void. Atlanta Cas. Co. v. Payne, 603 So. 2d 343, 346 (Miss. 1992).

mandate stacking in some situations, held that stacking of coverages may be permitted on two different occasions: when the UM coverage calls for separate premiums, and when the language of the policy, as a whole, is unclear and ambiguous.[26]

C. The Expansion of Permissible Stacking

1. Commercial Policies

The Mississippi Supreme Court took the initial step toward permitting aggregation of UM coverages in commercial UM policies in *Wickline v. United States Fidelity & Guaranty Co.* .[27] In *Wickline*, the decedent's representatives sought to recover aggregated UM coverages under a personal policy which covered the automobile in which the decedent was a guest, as well as three other vehicles.[28] The lower court, not-

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Several jurisdictions have held that an insurer cannot prohibit stacking when the insured has been required to pay multiple premiums disguised as a single payment. 12A GEORGE J. COUCH, ET AL., COUCH ON INSURANCE § 45:628 (2d rev. ed. 1981).

A federal court applying Mississippi law held that under Mississippi public policy, an insurer could not prohibit stacking when it charged what was, in effect, multiple premiums disguised as a single fee. Allstate Ins. Co. v. Ashley, 998 F.2d 300, 304 (5th Cir. 1993). In analyzing an insurance contract, the Mississippi Supreme Court will consider the insured's ignorance of the contract's terms and his unequal bargaining power. Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1189 (Miss. 1990).

[26] *Brown*, 446 So. 2d at 1006. The court reasoned that because the declaration sheet sought to provide separate UM coverage and charge separate premiums on all the vehicles while the "limits of liability" clause sought to repudiate such coverage, the policy was unambiguous. *Id.* Further, the court stated that aggregation of UM coverages must be permitted in this case because multiple premiums were charged. *Id.* The court reasoned that its holding in *Bridges* reflected the more reasoned approach. *Id.* (citing *Bridges*, 350 So. 2d at 1379). The court expressly abandoned its holding in *Talbot* and adopted the rationale of Justice Broom's dissent. *Id.* at 1005. In *Talbot*, Justice Broom argued that an insured who purchased multiple coverages should be entitled to all coverage for which a premium was paid, up to the amount of is damages. *Talbot*, 291 So. 2d at 704 (Broom, J., dissenting). The court has permitted intra-policy stacking where separate premiums were paid for each vehicle. Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 270 (Miss. 1979).

[27] 530 So. 2d 708 (Miss. 1988).

[28] *Wickline*, 530 So. 2d at 710. The decedent, Stacy Wickline, died while rid-

ing that the decedent was a Class II insured, held that the car was uninsured as to the decedent, but her representatives could not receive stacked coverage for the four automobiles covered under the driver's policy.[29] On appeal, the supreme court, in criticizing the distinction made between classes of insureds, held that a guest passenger injured by an uninsured motorist is entitled to stack the UM coverage of all vehicles insured by the policy which insures the host vehicle.[30]

In *Cossitt v. Nationwide Mutual Insurance Co.*,[31] the Mississippi Supreme Court for the first time directly addressed stacking of UM coverages in a commercial UM policy.[32] In *Cossitt*, an uninsured motorist struck the claimants while they were standing outside a church bus, and the claimants sought to recover stacked benefits from the church's UM carrier for the church's three buses covered under the policy.[33] At trial, the lower court held that the claimants could not collect stacked benefits under the commercial policy.[34] On

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ing as a passenger in another's vehicle. *Id.* Her death was due solely to the negligence of the driver of that vehicle. *Id.* The automobile was insured along with three other vehicles under a single policy. *Id.*

[29] *Id.* at 711. The trial court reasoned that because the decedent was a guest and therefore a Class II insured, the decedent's representatives were only entitled to collect UM benefits on the automobile involved in the accident. *Id.*

[30] *Id.* at 715. The court reasoned that Stacy Wickline was no less an insured than the owner of the policy, and no distinction should be made between classes of insureds for the purpose of aggregation of coverages. *Id.* at 714. The court further reasoned that the policy owner paid separate premiums for the benefit of all insureds, and aggregation should therefore be ordered. *Id.*

However, another Mississippi decision held that a guest passenger was limited to the UM coverage on the vehicle in which she was riding at the time of the accident because the policy's provisions unambiguously limited UM coverage for guests to the vehicle in which they were riding at the time of the accident. Meadows v. Mississippi Farm Bureau Ins. Co., 634 So. 2d 108, 110 (Miss. 1994).

It has also been held that allowing a non-insured victim to stack the UM coverage of a host automobile and another vehicle covered under the same policy to determine whether the host vehicle was underinsured is "contrary to the legislative purpose" of the UM statute. *Thiac*, 569 So. 2d at 1221.

[31] 551 So. 2d 879 (Miss. 1989).

[32] *Cossitt*, 551 So. 2d at 884. However, the court expressly declined to address whether stacking could be mandated on fleet coverage. *Id.*

[33] *Id.* Two passengers were injured and one died. *Id.*

[34] *Id.* at 881. The lower court denied all relief sought by the plaintiffs and

appeal, the Mississippi Supreme Court, reasoning that no distinction should be made between commercial and personal policies, held that stacking of UM coverages could be ordered even though the policy was commercial and not personal.[35]

2. *The Statutory Minimum*

Although the Mississippi Supreme Court had previous opportunities to rule on the issue, it was not until the court addressed *Casualty Reciprocal Exchange v. Federal Insurance Co.*(*In re Koestler*)[36] that the court expressly confronted the statutory minimum as applied to stacking cases.[37] In *In re Koestler*, the insured sought to aggregate UM coverages in excess of the statutory minimum despite an unambiguous provision precluding stacking above the amount required under Mississippi law.[38] The lower court held that the liability-limiting provision was irrelevant, and the insured could collect aggregated UM coverage.[39] On appeal, the supreme court rea-

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divided the interpleaded sum of $25,000 between the two injured passengers and the estate of the passenger that was killed in the accident. *Id.*

[35] *Id.* at 884. The court reasoned that stacking should be mandated in this case because it had previously permitted aggregation for Class II insureds under personal policies. *Id. See Wickline*, 530 So. 2d at 715 (eliminating distinction between classes of insureds).

The court, in a subsequent decision, relied on the holding in *Cossitt* and extended the right of aggregation to all types of commercial UM policies and all classes of insureds. Harris v. Magee, 573 So. 2d 646, 653 (Miss. 1990). In *Harris*, the court stated that its interpretation of the Mississippi UM statute has always been "shaped by the template of public policy upon which [the] statute is based—to provide protection to innocent motorists injured by financially irresponsible drivers." *Harris*, 573 So. 2d at 654 (citing *Stevens*, 345 So. 2d at 1043). In *Harris*, the Mississippi Supreme Court expressly held that there is no statutory basis for distinguishing between commercial fleet policies and personal policies. *Id.* at 655.

[36] 608 So. 2d 1258 (Miss. 1992), *overruled in part*, 636 So. 2d 658 (Miss. 1994).

[37] *In re Koestler*, 608 So. 2d at 1264. Without expressly ruling on the issue, the supreme court previously ordered aggregation of UM coverage in excess of the statutory minimum. *Cossitt*, 551 So. 2d at 884. *See Harris*, 573 So. 2d at 657 (permitting stacking of coverage in excess of statutory minimum).

[38] *In re Koestler*, 608 So. 2d at 1260. The Executrix claimed that Mississippi law mandated that coverage be stacked along with the coverage afforded in the excess UM policy. *Id.*

[39] *Id.* The circuit court relied on the fact that separate premiums were paid.

soned that the insurer and insured were free to contract for coverage above the statutory minimum, and held that the insurer, therefore, could validly limit its coverage through an unambiguous liability-limiting provision.[40]

The Mississippi Supreme Court confronted the statutory minimum again a few years later in *Nationwide Mutual Insurance Co. v. Garriga*.[41] In *Garriga*, the insurer attempted to contractually limit or offset workers' compensation benefits received by the insured to the extent such coverage exceeded the statutory minimum.[42] In partially overruling *In re Koestler*,[43] the supreme court held that its previous interpretation of the "statutory minimum" was incorrect.[44] The court further held that this type of offset provision was contrary to public policy and found the provision unenforceable, no matter how unambiguous it might have been.[45]

Id.

[40] *Id.* at 1264. The court reasoned that the payment of separate premiums did not necessarily entitle an insured to aggregated coverage. *Id.* Only an ambiguous liability-limiting provision would entitle an insured to aggregated coverage. *Id.*

[41] 636 So. 2d 658 (Miss. 1994).

[42] *Garriga*, 636 So. 2d at 662. The company argued that it included the provision for the sole purpose of preventing the insured of receiving a windfall. *Id.* at 661. However, the trial court found the provision overly broad. *Id.* Some subjects cannot be contracted. Hertz Commercial Leasing Div. v. Morrison, 567 So. 2d 832, 834 (Miss. 1990).

[43] *In Re Koestler*, 608 So. 2d at 1258. The supreme court overruled *In re Koestler* insofar as it held that the minimum required UM coverage is that amount required by Section 63-15-11 of the Mississippi Code Annotated. Land v. United States Fidelity & Guar. Co., 78 F.3d 187, 190-91 (5th Cir. 1996) (citing *Garriga*, 636 So. 2d at 665).

[44] *Garriga*, 636 So. 2d at 664. The court stated that the statutory minimum is the amount of coverage the insured elects up to the amount of liability coverage. *Id.* at 659-60. The court stated that the correct interpretation is that carriers should be commanded to provide coverage up to the amount of liability insurance purchased where the insured desires, and the insurers may not reduce this amount. *Id.* at 665. Another jurisdiction with a similar UM statute held the same. Gray v. Midland Risk Ins. Co., 925 P.2d 560, 562 (Okla. 1996).

The Mississippi Supreme Court has also stated that insurers have a duty to explain to their insureds their rights under the UM statute before coverage can be validly rejected. Aetna Cas. & Sur. Co. v. Berry, 669 So. 2d 56, 76 (Miss. 1996).

[45] *Garriga*, 636 So. 2d at 662. The court reasoned that an insured should receive the full benefit for what he pays, but no more. *Id.* In light of the new defi-

II. *UNITED STATES FIDELITY & GUAR. CO. V. FERGUSON*

A. Opinion of the Court

In *United States Fidelity & Guaranty Co. v. Ferguson*,[46] the Mississippi Supreme Court addressed whether an insured could aggregate UM coverages under a multiple-vehicle policy for which only one premium was paid.[47] The supreme court acknowledged that its previous holdings left insurers and insureds free to contractually limit stacking of UM coverage as long as the policy was unambiguous and the statutory minimum was upheld.[48]

The *Ferguson* court held that anti-stacking clauses as applied to UM coverage are contrary to public policy and unenforceable.[49] The court reasoned that the public policy of Mississippi requires stacking of UM coverage for all vehicles covered under a single policy, regardless of the number or amount of premiums paid for UM coverage.[50] Therefore, the court held that the insurer could not deny its insured the benefits under her policy for which a premium was paid, even if the insured did not pay a separate premium for each vehicle covered under the policy.[51]

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nition of "statutory minimum," the Mississippi Supreme Court ordered stacking of UM coverages even though only one premium was paid for coverage on multiple vehicles. Harrison v. Allstate Ins. Co., 662 So. 2d 1092, 1094 (Miss. 1995). The *Harrison* court held that, although the language of the anti-stacking clause was clear, because Harrison was charged separate premiums "under the guise of one lump sum," stacking would be ordered. *Harrison*, 662 So. 2d at 1094.

[46] No. 94-CA-01283-SCT, 1997 WL 426261, at *1 (Miss. July 31, 1997).

[47] *Ferguson*, 1997 WL 426261, at *2. The *Ferguson* court noted that stacking is "firmly embedded" in Mississippi case law, and is a "positive gloss" on our UM statute. *Id.* at *2 (citing *Harris*, 573 So. 2d at 653).

[48] *Id.* The court stated, however, that insurers responded by rewriting their policies to avoid compliance with the court's decisions. *Id.* at *3.

[49] *Id.* The court relied on the notion that insurance contracts are, in essence, contracts of adhesion, and an insured has little, if any, bargaining power. *Id.* at *4.

[50] *Id.* at *3. The court reasoned that in order to fulfill the intent of the uninsured motorist law of providing the insured with protection against injury caused by an uninsured motorist, anti-stacking provisions must be unenforceable. *Id.*

[51] *Id.* at *6. The court reasoned that because of the economic benefits of aggregating coverages and the insured's lack of bargaining power, it must adopt a

The *Ferguson* court also addressed the issue of whether stacking UM coverages violates the statutory prohibition against an insurer issuing UM coverage in excess of the amount of liability coverage provided by the policy.[52] The court held that UM coverage may be aggregated even when the stacked amount exceeds the insured's limit in liability coverage.[53]

B. Specially Concurring Opinion

Chief Justice Dan Lee specially concurred and stated that the majority's reasoning seriously hampered the ability of an insurer and insured to contract for UM coverage and was not sanctioned by the Mississippi Uninsured Motorist Act.[54] Justice Lee argued that, pursuant to the UM statute, insurers should be required to inform their insureds on their rights under the UM statute and obtain written rejections of stacking before they may limit aggregation of coverage.[55]

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rule upholding the public policy prohibiting anti-stacking clauses in order to prevent insurance companies from continuing to circumvent case law by writing their policies around the requirements of the court's decisions. *Id.*

[52] *Ferguson*, 1997 WL 426261, at *4-*5. Although USF&G argued that an insured cannot carry UM coverage in excess of her liability coverage, the court declined to interpret the uninsured motorist statute as prohibiting an insured from recovering stacked benefits where the stacked sum exceeds the amount of liability coverage. *Id.* at *5.

[53] *Id.* at *6. The court stated, "[T]he statutory minimum is 'that amount of coverage that the insured elects up to the amount of liability coverage purchased.'" *Id.* at *5 (quoting *Garriga*, 636 So. 2d at 659).

The court also addressed the issue of whether the insurer was entitled to an offset credit for sums paid by the underinsured tortfeasor's liability insurance carrier and determined that the insurer could validly offset the insured's recovery by such amount. *Id.* at *6.

[54] *Id.* (Lee, C.J., specially concurring). Chief Justice Lee stated that the majority's opinion was too broad and outside the scope of "permissible interpretation" of the UM statute. *Id.* (Lee, C.J., specially concurring). He also noted that stacking coverages was not mentioned anywhere in the statute as a type of minimum or mandatory coverage. *Id.* at *7 (Lee, C.J., specially concurring). Chief Justice Lee stated that the method used by the majority, while "appealingly simple," was not supportable by the UM statute. *Id.* at *8 (Lee, C.J., specially concurring). He stated that there was a better method to reach the same result. *Ferguson*, 1997 WL 426261, at *8 (Lee, C.J., specially concurring).

[55] *Id.* (Lee, C.J., specially concurring). Chief Justice Lee stated that, from the

III. Discussion

In *United States Fidelity & Guaranty Co. v. Ferguson*, the Mississippi Supreme Court broke new ground by adopting a public policy that holds all anti-stacking provisions in UM policies unenforceable.[56] Consequently, the *Ferguson* opinion will likely have significant effects on uninsured motorist law in Mississippi.

As a result of the *Ferguson* opinion, an insurance company may no longer validly write anti-stacking provisions in its UM policies.[57] Prior to *Ferguson*, an automobile insurer could, subject to certain restrictions, preclude an insured from collecting stacked UM coverage when injured by an uninsured or underinsured motorist.[58] The *Ferguson* decision could have additional ramifications for insurers because courts may interpret the new rule to preclude numerous provisions which are unfavorable or do not meet the "reasonable expectations" of the insured.[59]

The decision in *Ferguson* might also make it easier for an insured to recover the full amount of his damages arising from an accident with an uninsured or underinsured motorist since

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language of the statute, it was obvious that the legislature contemplated that UM coverage could be removed from the policy at the option of the insured so long as it was in writing. *Id.* (Lee, C.J., specially concurring). Justice Lee argued that requiring insurers to educate their insureds and obtain written rejections of coverage balances the interests of the insurer and insured by giving the insured the most protection possible from adhesive insurance contracts and allowing the insured the right to stack if she desires. *Id.* (Lee, C.J., specially concurring).

[56] *See supra* notes 8, 9, 50, 51, 52, and accompanying text. Other jurisdictions have held that aggregation of benefits may only be had if the policy is ambiguous or if separate premiums are paid. *See supra* notes 24, 25, and accompanying text.

[57] *Ferguson*, 1997 WL 426261, at *3. The court noted that because insurers were writing around the court's decisions, it must adopt a policy to provide the insured with protection from adhesive contracts and the unbalanced bargaining power of the insurer. *Id.* at *4.

[58] *See supra* notes 15, 17, 21, 23, 25, 26, 30, 35, and accompanying text. The court previously held that an insurer may validly preclude stacking of coverage when the policy is unambiguous and when separate premiums are paid. *See supra* notes 15, 17, 21, 23, 25, 26, 30, 35, and accompanying text.

[59] *See supra* notes 9, 49, and accompanying text. Future courts will consider factors such as the insured's ignorance of the terms of the policy. *See supra* note 24 and accompanying text.

insurers may no longer include anti-stacking provisions in their UM policies.[60] However, an insured will still be unable to recover more than his full amount in damages.[61] Although the *Ferguson* opinion, according to the special concurrence, may not have been based on the language of the Uninsured Motorist Act, the decision surely fulfills its intent and purpose by making it easier for an injured insured to collect the full amount of his damages.[62]

IV. CONCLUSION

The opinion in *Ferguson* evidences the supreme court's intolerance of the insurance industry, as a whole, rewriting its policies to circumvent the court's decisions. The opinion also indicates the desire of the court to fulfill the intent of the UM statute by giving the insured every possible opportunity to recover the full amount of his damages when injured by an uninsured or underinsured motorist. Thus, with the invalidation of anti-stacking provisions in Mississippi, courts will mandate stacking of coverage of multiple vehicles under one policy to the extent of the insured's damages.

Paige Craig

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[60] *See supra* notes 9, 12, 49, 50, 51, and accompanying text. Because the court will not interfere with the right of insurers and insureds to contract for the amount of UM coverage the insured wishes to purchase as long as the statutory requirements are met, an insured is more likely to recover the full amount of his damages. *See supra* note 9 and accompanying text.

[61] *See supra* notes 9, 53, and accompanying text. An insurer may also reduce the amount owed under a UM provision by sums paid by the tortfeasor's liability carrier. *See supra* notes 9, 53, and accompanying text.

[62] *See supra* notes 12, 54, 55, and accompanying text. The court interpreted the language of the Act broadly. *See supra* notes 54, 55, and accompanying text.

BANKRUPTCY—VALUATION OF COLLATERAL—REPLACEMENT COST TO DEBTOR DETERMINES THE STANDARD FOR VALUING COLLATERAL RETAINED UNDER CRAM DOWN PROVISIONS

In 1992, Elray and Jean Rash filed a joint petition and repayment plan under Chapter 13 of the Bankruptcy Code (Code).[1] Under the repayment plan, the Rashes sought to retain possession of a tractor truck over the objection of the creditor, Associates Commercial Corporation (A.C.C.).[2] A.C.C. sought to repossess the truck and disputed the Rash's valuation of the truck, which was based on the amount foreclosure and resale would bring.[3] The bankruptcy court agreed with the Rashes' valuation and set the amount of A.C.C.'s secured claim at $31,875.[4] After the United States District Court for

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[1] Associates Commercial Corp. v. Rash (*In re* Rash), 117 S. Ct. 1879, 1882 (1997).

[2] *In re Rash*, 117 S. Ct. at 1882-83. In 1989, Elray Rash purchased a tractor truck for use in his freight-hauling business. *Id.* at 1882. The seller assigned the loan to A.C.C., which also held a lien on the truck. *Id.* The Rashes' Chapter 13 plan invoked the so-called "cram down" option, which allows a debtor to keep the property over the objection of the creditor. *Id.* at 1883. Under the cram down option, the creditor retains a lien securing the claim, and the debtor must pay the creditor the present value of the collateral over the duration of the plan. *Id.* at 1882-83.

[3] *Id.* at 1883. At the time the Rashes filed for bankruptcy, they owed $41,171 to A.C.C. on the truck loan. *Id.* at 1882. Under the Code, the lien on the truck secured A.C.C.'s claim for the balance owed only to the extent of the present value of the truck. *Id.* Any claim by A.C.C. above the value of the collateral was unsecured, and would be paid pursuant to the provisions of the plan. *Id.* at 1882-83. The Rashes asserted that the value of the truck was $31,875, and A.C.C.'s claim was secured up to that amount. *In re Rash*, 117 S. Ct. at 1883. This was the net amount which A.C.C. would realize if the truck was foreclosed upon and sold. *Id.* A.C.C. claimed the value of the truck was $41,000, the price the Rashes would have to pay to purchase a similar vehicle. *Id.*

[4] *Id.* The bankruptcy court found that the Rashes' appraisal best represented the net amount A.C.C. would realize upon repossession and sale of the truck. *Id.* The bankruptcy court later approved the Rashes' Chapter 13 plan. *Id.*

the Eastern District of Texas affirmed the plan, a panel of the Fifth Circuit reversed the lower court decision.[5]

After a rehearing en banc, the Fifth Circuit affirmed the District Court, holding the foreclosure value of the truck determined the amount of A.C.C.'s secured claim.[6] After granting certiorari, the United States Supreme Court held: Reversed and remanded.[7] The Court held that when a debtor seeks to retain the collateral by invoking the cram down option during bankruptcy proceedings, the replacement costs to the debtor to obtain like property determined the value of the property and thus the amount of the creditor's secured claim.[8]

I. Related Law

A. Foreclosure Value Standard

The Ninth Circuit considered the proper standard for valuation when determining the amount of a creditor's secured interest in *General Motors Acceptance Corp. v. Mitchell (In re Mitchell)*.[9] In *In re Mitchell*, the Ninth Circuit Bankruptcy

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[5] *Id.* While the district court adopted the foreclosure value standard, a panel of the Fifth Circuit rejected this view in favor of the replacement value standard advocated by A.C.C. . *Id.*

[6] *Id.* The Fifth Circuit based its decision on what it perceived as a conflict between A.C.C.'s valuation method and the foreclosure remedy available under Texas state law. *Id.* The majority argued the Code required the court to value the property based on the creditor's interest in the collateral. *Id.* The circuit court reasoned that the creditor's interest gave only the right to repossess and sell the property, and therefore the amount realizable from such a sale determined the valuation of the collateral. *Id.*

[7] *In re Rash*, 117 S. Ct. at 1887. The Supreme Court granted certiorari to resolve a conflict between the circuits created in part by the Fifth Circuit's adoption of the foreclosure value standard. *Id.* at 1884. The Court reversed because the Fifth Circuit's opinion relied on a faulty interpretation of relevant Code provisions. *Id.*

[8] *Id.* at 1886. The Supreme Court referred to this valuation as the replacement value standard. *Id.* at 1885. The Court stated that the price a willing buyer would pay to a willing seller to obtain like property established the replacement value. *Id.* at 1884 n.2. The Court focused on Code provisions that required the value of the collateral be assigned in light of the proposed use of the property. *Id.* at 1885. The Court found that to value the collateral at the foreclosure value ignored the fact that the debtor retains the property. *In re Rash*, 117 S. Ct. at 1885.

[9] 954 F.2d 557 (9th Cir. 1992), *overruled by* Taffi v. United States (*In re*

Appellate Panel reversed the decision of the bankruptcy court, which had determined the value of the secured claim based on the retail value of the collateral.[10] The Ninth Circuit affirmed the decision, holding that the appellate court had correctly assigned the value of the secured interest based on wholesale value.[11] The circuit court reasoned that when debtors invoked the cram down option, wholesale value best approximated what the creditor could obtain in a commercially reasonable sale.[12]

Taffi), 96 F.3d 1190 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997).

[10] *In re Mitchell*, 954 F.2d at 559. The debtors appealed the order of the bankruptcy court entering the value of the collateral based on the retail value. *Id.* Judge Queenan of the United States Bankruptcy Court for the District of Massachusetts has written extensively on the valuation of collateral. *See, e.g.*, James F. Queenan, *Standards for Valuation of Security Interests in Chapter 11*, 92 COM. L.J. 19, 19 (1987). Judge Queenan has consistently applied a value less than fair market value in cases appearing before his court. *In re* Ledgemere Land Corp., 125 B.R. 58, 61 (Bankr. D. Mass. 1991). *See In re* Robbins, 119 B.R. 1, 3 (Bankr. D. Mass. 1990) (holding fair market value of collateral does not control valuation standard); *see also In re* T.H.B. Corp., 85 B.R. 192, 196 (Bankr. D. Mass. 1988) (stating liquidation value was proper standard for valuing amount of secured creditor's claim).

[11] *In re Mitchell*, 954 F.2d at 560. The Ninth Circuit relied on Judge Queenan's argument that it was not the debtor's interest in the collateral, but the creditor's interest, that was being measured. *Id.* (citing Queenan, *supra* note 10, at 30). The court stated the creditor's interest was determined by the reasonable amount the creditor could obtain for the collateral upon foreclosure. *Id.* The court concluded wholesale value best approximated the creditor's interest. *Id.* At least one commentator argued the creditor's interest should be valued based on the collateral's worth in the hands of the debtor. Roger S. Cox, *Bankruptcy and Creditors' Rights*, 50 SMU L. REV. 989, 997 (1997) (quoting Associates Commercial Corp. v. Rash, (*In re* Rash), 90 F.3d 1036, 1061 (5th Cir. 1996) (Smith, J., dissenting), *rev'd*, 117 S. Ct. 1879 (1997)).

The court's decision in *In re Mitchell* was based heavily on *In re Malody*, the leading Ninth Circuit case on valuation standards. Edwin S. Clark, Survey, In re Mitchell: *Standards of Valuation in Chapter 13 Proceedings Under 11 U.S.C. § 506(a)*, 23 GOLDEN GATE U. L. REV. 9, 21 (1993). In *In re Malody*, the Ninth Circuit Bankruptcy Appellate Panel rejected the replacement value standard in favor of a wholesale value standard. Valley Nat'l Bank v. Malody (*In re* Malody), 102 B.R. 745, 750 (B.A.P. 9th Cir. 1989), *abrogation recognized by* Hobbs v. Gurley Motor Co. (*In re* Hobbs), 204 B.R. 994 (Bankr. D. Ariz. 1997).

[12] *In re Mitchell*, 954 F.2d at 560. The Ninth Circuit noted the purpose of valuation under the cram down option was to determine the creditor's secured claim under the debtor's Chapter 13 plan. *Id.* at 558. Pursuant to 11 U.S.C. § 1325 (a)(5)(B), the cram down provisions allow the debtor in Chapter 13 to retain the property over the objection of the creditor if the creditor retains a lien

B. Midpoint-Value Standard

The Second Circuit addressed the standard for valuation when the debtor has invoked the cram down option in *General Motors Acceptance Corp. v. Valenti (In re Valenti)*.[13] The bankruptcy court in *In re Valenti* valued the vehicle, which the debtor sought to retain under the cram down option, at the average of the wholesale and retail values of the car.[14] On appeal, the Second Circuit affirmed the lower court's decision and adopted the average of retail and wholesale value as the standard.[15] The circuit court reasoned that while the retail value could overcompensate the creditor's interest, the

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on the collateral and will receive the present value of the secured claim over the life of the plan. Johnson v. General Motors Acceptance Corp. (*In re* Johnson), 165 B.R. 524, 527 (S.D. Ga. 1994). The first sentence of 11 U.S.C. § 506(a), which provides that a claim is secured to the extent the creditor has an interest in the debtor's property, determines the amount of the secured claim. Volk v. Goldome Realty Credit Corp. (*In re* 222 Liberty Assocs.), 105 B.R. 798, 804 (Bankr. E.D. Pa. 1989). The second sentence of 11 U.S.C. § 506(a) provides that the value of the collateral be determined "in light of the purpose of the valuation" and the proposed use of the property. 11 U.S.C. § 506(a) (1994). The legislative history behind 11 U.S.C. § 506(a) fails to clarify whether a bankruptcy court should apply the wholesale value suggested by the first sentence or the retail value suggested by the second sentence. Irving D. Labovitz, *Valuation of Claims Under the Bankruptcy Act: The Current State of Ongoing Developments*, 114 BANKING L.J. 196, 198 (1997).

[13] 105 F.3d 55 (2d Cir. 1997), *abrogated by* Associates Commercial Corp. v. Rash (*In re* Rash), 117 S. Ct. 1879 (1997).

[14] *In re Valenti*, 105 F.3d at 58. The bankruptcy court acted pursuant to a local bankruptcy rule which dictated that the average of trade-in and retail values determined the value of vehicles. *Id.*

[15] *Id.* at 62. The Second Circuit noted the challenge of interpreting and applying 11 U.S.C. § 506(a). *Id.* at 61. One court noted that any interpretation of 11 U.S.C. § 506(a) must give meaning to each portion of the statute and avoid rendering any provisions inoperative. *In re* Madison, 186 B.R. 182, 184 (Bankr. E.D. Pa. 1995) (citing United States v. Nordic Village, Inc., 503 U.S. 30, 34-36 (1992)).

The Second Circuit was not persuaded by courts advocating either the foreclosure or the fair market value and relied upon cases adopting a valuation standard between retail and wholesale value. *In re Valenti*, 105 F.3d at 61. *See In re* Myers, 178 B.R. 518, 524 (Bankr. W.D. Okla. 1995) (adopting midpoint standard in order to give full effect to 11 U.S.C. § 506(a)); *In re* Carlan, 157 B.R. 324, 326 (Bankr. S.D. Tex. 1993) (asserting equitable nature of court in setting value of vehicle between wholesale and retail).

foreclosure or wholesale value failed to consider the proposed use of the property.[16]

The Seventh Circuit considered the question of valuation of collateral which the debtor intended to retain in *In re Hoskins*.[17] In *In re Hoskins*, the creditor objected to the bankruptcy court's valuation of the debtor's vehicle at the average of its wholesale and retail values.[18] The Seventh Circuit affirmed the decision, and held that neither wholesale nor retail value adequately protected the debtor or reimbursed the creditor.[19] The circuit court reasoned the midpoint represented the valuation of the collateral which the creditor and debtor would have agreed upon had bankruptcy not been filed.[20]

C. Replacement Value Standard

The Eighth Circuit addressed the question of placing a value on collateral that the debtor sought to retain under a bankruptcy plan in *Metrobank v. Trimble (In re Trimble)*.[21] In *In re Trimble*, the creditor appealed the order of the bankrupt-

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[16] *In re Valenti*, 105 F.3d at 62. The Second Circuit stated the midpoint standard gave effect to both sentences of 11 U.S.C. § 506(a) and retained the flexibility of bankruptcy courts. *Id.* The court noted that if the purpose of the valuation and the use of the collateral were considered, an exact valuation standard was unnecessary. *Id.*

[17] 102 F.3d 311 (7th Cir. 1996), *abrogated by* Associates Commercial Corp. v. Rash (*In re* Rash), 117 S. Ct. 1879 (1997).

[18] *In re Hoskins*, 102 F.3d at 313. The bankruptcy court entered an order valuing the debtor's vehicle midway between the stipulated retail value and the stipulated wholesale value. *Id.*

[19] *Id.* at 315-16. The Seventh Circuit found that assigning a value between the wholesale and retail prices protected the interests of both the creditor and the debtor. *Id.* at 316. The circuit court noted the midpoint valuation allowed the creditor to receive more than if the car had been repossessed and sold while enabled the debtor to retain the car at a price less than its replacement cost. *Id.*

[20] *Id.* The Seventh Circuit relied on economic theory in adopting a "split the difference" standard. *Id.* The circuit court noted that it had adopted a strict rule and rejected a valuation which is variable under the wholesale or replacement standards. *Id.* Courts adopting a retail or replacement value have rejected the reasoning of the Seventh Circuit and concluded that by retaining the property the debtor acknowledges the property is worth more than the liquidation value. *In re* Penz, 102 B.R. 826, 828 (Bankr. E.D. Okla. 1989).

[21] 50 F.3d 530 (8th Cir. 1995).

cy court, which set the amount of the secured creditor's claim at the wholesale value of the debtor's vehicle.[22] The Eighth Circuit reversed the decision and held that when the debtor seeks to retain the property, the value of the creditor's secured claim was equal to the retail cost of the collateral without deductions for hypothetical costs of sale.[23] The circuit court reasoned that the second sentence of 11 U.S.C. § 506(a) required consideration of both the purpose of the valuation and the proposed use of the collateral in order to determine the amount of the creditor's secured claim.[24]

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[22] *In re Trimble*, 50 F.3d at 530. The debtors invoked the cram down provision and sought to retain possession of their property on which the creditor had a lien. *Id.*

[23] *Id.* at 531. The Eighth Circuit concluded the value of the creditor's secured claim was the retail value of the collateral, without deductions for costs of sale. *Id.* at 532. Courts which use the wholesale value standard generally deduct the costs of sale that the creditor would incur upon foreclosure and resale. *In re* Claeys, 81 B.R. 985, 991 (Bankr. D.N.D. 1987). *See also* Overholt v. Farm Credit Servs. (*In re* Overholt), 125 B.R. 202, 215 (S.D. Ohio 1990) (holding that to determine creditor's interest, courts must subtract hypothetical liquidation costs from fair market value).

Applying the replacement value standard in *In re Trimble* resulted in the creditor receiving approximately the full amount of the outstanding balance. *In re Trimble*, 50 F.3d at 530, 532. As the value of the collateral increased, the amount of the creditor's secured claim also increased. David G. Carlson, *Secured Creditors and the Eely Character of Bankruptcy Valuations*, 41 AM. U.L. REV. 63, 72-73 (1991). The adoption of the replacement value standard improved the position of undersecured creditors. *Id.*

[24] *In re Trimble*, 50 F.3d at 531-32. The court in *In re Trimble* noted that the retail value is the only standard that gives meaning to the entire language of 11 U.S.C. § 506(a). *Id.* at 532.

The Eighth Circuit relied heavily on the decision of a panel of the Fifth Circuit in *In re Rash*. *Id.* at 531. The panel of the Fifth Circuit adopted a replacement value standard and held that retail value was the correct measure of the creditor's secured claim. Associates Commercial Corp. v. Rash (*In re* Rash), 31 F.3d 325, 331 (5th Cir. 1994), *rev'd en banc*, 90 F.3d 1036 (5th Cir. 1996), *rev'd*, 117 S. Ct. 1879 (1997). The Fifth Circuit, sitting en banc, reversed the panel's decision and adopted a foreclosure value standard. Associates Commercial Corp. v. Rash (*In re* Rash), 90 F.3d 1036, 1061 (5th Cir. 1996) (en banc), *rev'd*, 117 S. Ct. 1879 (1997). The Fifth Circuit en banc opinion focused on the amount the creditor would realize by exercising their right to repossess and sell the collateral. *In re Rash*, 90 F.3d at 1044. The Supreme Court granted certiorari in *In re Rash* to resolve the split between the circuits created by the Fifth Circuit en banc opinion. Leading Case, *Valuation Standard for Assets in Cram Down*, 111 HARV. L. REV.

The First Circuit considered whether real property which the debtor intended to retain should be valued based on its fair market value in *Winthrop Old Farm Nurseries, Inc. v. New Bedford Institution for Savings (In re Winthrop)*.[25] In *In re Winthrop*, the bankruptcy court set the value of the property that the debtor will retain at the fair market or going-concern value.[26] On appeal, the First Circuit affirmed the decision.[27] The circuit court reasoned that the debtor had avoided foreclosure through bankruptcy reorganization and declined to use the liquidation value when the debtor retained the property.[28]

380, 383 (1997).

[25] 50 F.3d 72 (1st Cir. 1995).

[26] *In re Winthrop*, 50 F.3d at 72. Both the bankruptcy court and the First Circuit cited a string of cases supporting the fair market standard as the appropriate standard when the debtor intends to retain the property. *Id.* at 74. *Compare* Arnette v. General Motors Acceptance Corp. (*In re* Arnette), 156 B.R. 366, 367 (Bankr. D. Conn. 1993) (defining fair market value as price debtor could obtain for property in open market), *with In re* Demakes Enters., Inc., 145 B.R. 362, 365 (Bankr. D. Mass. 1992) (stating in dicta that fair market value is "artificial, theoretical estimate" and not appropriate standard).

Courts adopting the fair market value approach focused on the debtor's interest in retaining the collateral when valuing the creditor's interest. Brown & Co. Sec. Corp. v. Balbus (*In re* Balbus), 933 F.2d 246, 249 (4th Cir. 1991) (citing *In re* Boring, 91 B.R. 791, 795 (Bankr. S.D. Ohio 1988)). Courts adopting wholesale or foreclosure value assert that the second sentence of 11 U.S.C. § 506(a), which required the collateral be valued in light of its proposed use, did not provide creditors a secured claim for more than the amount the property would bring upon foreclosure and sale. *In re* Maddox, 200 B.R. 546, 552 (D.N.J. 1996).

[27] *In re Winthrop*, 50 F.3d at 73. This case presented a matter of first impression for the First Circuit. *Id.* at 74. The First Circuit reasoned it should not value the collateral as if it were being liquidated, by deducting the costs of a hypothetical sale, since the debtor intended to retain the property. *Id.* at 75. No real difference exists between wholesale or liquidated value and retail value less the costs involved in the sale. *In re* Byington, 197 B.R. 130, 135 n.10 (Bankr. D. Kan. 1996). *See* General Motors Acceptance Corp. v. Johnson (*In re* Johnson), 145 B.R. 108, 115 n.10 (Bankr. S.D. Ga. 1992) (stating wholesale value equals foreclosure or liquidation value, and retail value equals going concern or replacement value), *rev'd on other grounds*, 165 B.R. 524 (S.D. Ga. 1994); *see also* Robert F. Mitsch & Carleton B. Crutchfield, *The Rash Decision: A Question of Value in Context*, 16 AM. BANKR. INST. J. 18, 19 (1997) (stating that applying foreclosure value results in windfall to debtor).

[28] *In re Winthrop*, 50 F.3d at 75. The First Circuit found it inequitable to allow a debtor to reap a windfall by limiting a creditor's secured claim to the

The Ninth Circuit again addressed the issue of valuation in bankruptcy proceedings where the debtor intended to retain the property in *Taffi v. United States (In re Taffi)*.[29] In *In re Taffi*, the debtors sought to limit the amount of the IRS's secured claim to the foreclosure value of their home.[30] The bankruptcy court accepted the foreclosure value of the house and ordered the IRS's unsecured claims satisfied by payment of a fraction of the amount, according to the provisions of the plan.[31] The district court reversed the decision and held that the fair market value of the house determined the amount of the IRS's secured claim.[32] On appeal, the Ninth Circuit af-

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liquidation value when the debtor could sell the collateral at market value. *Id.* at 76. Courts refer to seeking both retention of the property and foreclosure value of the collateral as an attempt by a debtor to "eat with the hounds and run with the hares." *In re* Crockett, 3 B.R. 365, 367 (Bankr. N.D. Ill. 1980). *But cf.* Owen W. Katz, *Valuation of Secured Claims in a Bankruptcy Reorganization: Eating with the Hounds and Running with the Hares*, 100 COM. L.J. 320, 352 (1995) (supporting wholesale value standard because of equitable nature of Code).

[29] 96 F.3d 1190 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2478 (1997).

[30] *In re Taffi*, 96 F.3d at 1192. Considering senior liens, the amount of the IRS secured claim would have been $66,057.62 if fair market value was used and $39,057.62 if hypothetical costs of sale were deducted. *Id.* at 1191. Based on the foreclosure value, the amount of the IRS secured claim would have been only $6,057.62, and the IRS would receive nothing on the tax lien if hypothetical costs of sales were deducted. *Id.* In an amicus brief, Ford Motor Credit Company stated that at the national level the difference between fair market value and foreclosure value represents $26,600,000 of its secured claims annually. *In re* Green, 151 B.R. 501, 501 n.1 (Bankr. D. Minn. 1993). The creditor's lobby has been unsuccessful in an attempt to enact an amendment to 11 U.S.C. § 506(a), which would provide the resale market price as the standard for valuation. Thomas E. Ray, *Valuation of Collateral Revisited*, 15 AM. BANKR. INST. J. 16, 16 n.5 (1996).

[31] *In re Taffi*, 96 F.3d at 1191. The bankruptcy court relied on *In re Mitchell*, an earlier Ninth Circuit case. *Id.* Although the bankruptcy court disagreed with the Ninth Circuit's reasoning in *In re Mitchell*, it concluded the foreclosure standard adopted controlled the facts of the case. *Id.*

[32] *Id.* A divided panel of the Ninth Circuit upheld the judgment of the district court. *Id.* at 1192. The panel distinguished *In re Mitchell* as a case involving the value of a car rather than a house. *Id.* The panel also concluded hypothetical costs of sale should not be deducted from the fair market value. *Id.* Since the debtor retains the property under the cram down option, many courts have concluded sales costs should not be deducted. Huntington Nat'l Bank v. Pees (*In re* McClurkin), 31 F.3d 401, 405 (6th Cir. 1994). *See* Coker v. Sovran Equity Mortgage Corp. (*In re* Coker), 973 F.2d 258, 260 (4th Cir. 1992) (holding creditor's

firmed the district court decision, holding that when the debtor intends to retain the property under the bankruptcy plan, the value of the collateral must reflect the price a willing seller and a willing buyer would agree upon in light of market factors.[33]

II. *Associates Commercial Corp. v. Rash* (*In re* Rash)

A. Opinion of the Court

In *Associates Commercial Corp. v. Rash (In re Rash)*,[34] the United States Supreme Court held that when the debtor elects to retain property over the objection of a secured creditor, the valuation of the collateral, and thus the extent of the creditor's secured claim, is based on the replacement cost to the debtor.[35] The Court rejected arguments that the first sentence of 11 U.S.C. § 506(a) requires adoption of a foreclosure

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secured claim was not limited to foreclosure value because debtor avoided foreclosure by filing for bankruptcy protection).

[33] *In re Taffi*, 96 F.3d at 1192. The Ninth Circuit reasoned that because the creditor could not foreclose since the debtor invoked the cram down option, neither the foreclosure value nor the costs involved with a resale should be considered. *Id.* Many courts have concluded that the debtor's retention of the collateral does not change the fact that 11 U.S.C. § 506(a) requires the creditor's interest in the collateral be valued. *In re* Smith, 92 B.R. 287, 290 (Bankr. S.D. Ohio 1988) (deducting costs of hypothetical sale). The focus on the creditor's interest is derived from the first sentence of 11 U.S.C. § 506(a) which governs the determination of the creditor's secured claim. *In re* Weber, 140 B.R. 707, 709-11 (Bankr. S.D. Ohio 1992). Where the value of the collateral is less than the amount owed to a secured creditor, the value of the collateral defines the value of the creditor's interest under 11 U.S.C. § 506(a). United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 372 (1988).

The Ninth Circuit in *In re Taffi* distinguished between the fair market value and the replacement value of the collateral and stated only that the debtors in this case were not replacing the house. *In re Taffi*, 96 F.3d at 1192. *Cf.* 4 R. Glen Ayers et al., Collier on Bankruptcy ¶ 506.03(7)(c) at 506-73 to 506-75 (Lawrence P. King et al eds., 15th ed. 1997) (distinguishing between fair market value and replacement costs).

[34] 117 S. Ct. 1879 (1997).

[35] *In re Rash*, 117 S. Ct. at 1884. The Supreme Court reasoned that any valuation of the collateral must acknowledge that the Rashes elected to retain possession of the truck over the objection of A.C.C. by invoking the cram down option pursuant to 11 U.S.C. § 1325(a)(5)(B). *Id.*

standard.[36] The Court relied on the second sentence of 11 U.S.C. § 506(a) in determining that the collateral should be valued in consideration of the proposed use.[37] The Court noted that applying the foreclosure value standard when the debtor invokes the cram down option ignores the fact that the debtor's retention of the property has a different economic effect on the creditor than had the debtor surrendered the property.[38]

The Court stated the replacement value is consistent with fair market value.[39] While the majority opinion leaves to bankruptcy courts the determination of what constitutes the replacement value, the Court provided clear guidelines on what to exclude.[40]

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[36] *Id.* The Supreme Court failed to find any valuation standard in the first sentence of 11 U.S.C. § 506(a). *Id.* The Court reasoned the first sentence reveals only that the creditors' claims must be divided into secured and unsecured portions, and the value of the secured claim is limited to the value of the collateral. *Id.*

[37] *Id.* at 1885. The Supreme Court stated that the second sentence of 11 U.S.C. § 506(a) requires the valuation take into consideration the proposed use of the property. *Id.* The Court noted the use of collateral depends on whether, under the reorganization plan, the debtor intends to surrender the property pursuant to 11 U.S.C. § 1325(a)(5)(C), or retain the property and pay the creditor the present value of the collateral over the life of the plan, pursuant to 11 U.S.C. § 1325(a)(5)(B). *Id.*

[38] *Id.* The Supreme Court noted that if the debtor had surrendered the property, the creditor would be free to resell the property, and reinvest the proceeds through an extension of a loan to another party. *Id.* The court commented that the debtor's retention of the property exposed the creditor to the additional risks of another default and increased deterioration of the collateral. *Id.*

[39] *Id.* at 1884 n.2. The Supreme Court stated the Ninth Circuit in *In re Taffi* incorrectly viewed fair market value as incompatible with the replacement value standard. *Id.* In clarifying the terms, the Court held that replacement value is the price a willing buyer in the same trade as the debtor would pay a willing seller for like property. *Id.* The Court found this definition consistent with the Ninth Circuit's use of fair market value in *In re Taffi*. *Id.*

[40] *In re Rash*, 117 S. Ct. at 1886 n.6. The Supreme Court stated that bankruptcy courts, as triers of fact, are in the best position to determine replacement value. *Id.* The Court suggested that whether replacement value was equal to retail, wholesale, or another type of value must be determined considering the debtor and the nature of the property. *Id.* Unlike the Fifth Circuit en banc opinion in *In re Rash*, the Court concluded the replacement value should not include items such as warranties, storage, or modifications. *Id.*

B. Dissenting Opinion

Justice Stevens wrote a dissenting opinion and argued that foreclosure was the proper method of valuation when the debtor has invoked the cram down option.[41] He asserted the proper interpretation of the creditor's interest under the cram down provision would place the creditor in the same economic position as if the right to foreclose had been exercised.[42] Justice Stevens reasoned that the replacement value standard gave secured creditors an unfair economic advantage over undersecured creditors.[43]

III. Discussion

In *Associates Commercial Corp. v. Rash (In re Rash)*, the United States Supreme Court resolved the conflict between the circuits over the proper interpretation of 11 U.S.C. § 506(a) when the debtor seeks to retain the property by invoking the cram down option during reorganization.[44] This

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[41] *Id.* at 1887 (Stevens, J., dissenting). Justice Stevens focused on the first sentence of 11 U.S.C. § 506(a), which he found required the valuation to be based on what the collateral was worth in the hands of the creditor. *Id.* (Stevens, J., dissenting). He noted the foreclosure value standard did not render the usage provision of the second sentence of 11 U.S.C. § 506(a) inoperative. *Id.* (Stevens, J., dissenting).

[42] *Id.* (Stevens, J., dissenting). Justice Stevens thought that the purpose of valuation under the cram down provisions was to provide the creditor with the present value of the property based on the creditor's interest. *Id.* (Stevens, J., dissenting). He asserted that since the creditor's option to repossess and resell was avoided by invoking the cram down provision, the creditor was entitled to receive only the amount it would have realized had the foreclosure right been exercised. *Id.* (Stevens, J., dissenting).

[43] *Id.* (Stevens, J., dissenting). Justice Stevens considered the majority's adoption of the replacement value standard as "grant[ing] a general windfall to undersecured creditors at the expense of unsecured creditors." *Id.* (Stevens, J., dissenting). He also noted that the foreclosure value standard kept the position of secured and unsecured creditors the same throughout various bankruptcy chapters. *Id.* (Stevens, J., dissenting).

[44] *See supra* notes 7, 24 and accompanying text. Prior to the Supreme Court's decision in *In re Rash* the First, Fourth, Sixth, and Ninth Circuits had adopted a fair market value or replacement standard without deductions for the hypothetical costs of sales. *See supra* notes 23-24, 26-27, 32-33 and accompanying text. The Fifth Circuit, and prior to *In re Taffi*, the Ninth Circuit, considered foreclosure

decision will strengthen the position of undersecured creditors during bankruptcy proceedings that determine the amount of secured and unsecured claims.[45] Creditors with senior liens should expect to receive a higher percentage of the total amount due.[46] The *In re Rash* decision could affect junior lienholders who are undersecured because a larger portion of debtors' assets will be expended to pay the higher replacement value of the collateral to senior creditors.[47]

By noting the replacement value could be the retail or wholesale value of the collateral, the *In re Rash* decision leaves some ambiguities as to the exact basis for valuing collateral.[48] While it is clear that the value is based on the costs to the debtor to obtain like property, valuation must be made on a case-by-case basis under the Court's decision.[49] Although this could create confusion for lower courts, the Court clearly stated bankruptcy courts were the correct forums in which to make such determinations.[50]

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the proper standard. *See supra* notes 11-12, 24 and accompanying text. The Second and Seventh Circuits adopted standards which fell between fair market and wholesale value. *See supra* notes 15-16, 19-20 and accompanying text.

[45] *See supra* notes 23, 30 and accompanying text. Creditors whose claims exceed the value of the collateral see an increase in the amount of the secured claim through application of the replacement standard. *See supra* notes 23, 30 and accompanying text.

[46] *See supra* notes 23, 30 and accompanying text. Since the creditor's claim will be set at the higher replacement value, less of the balance will be unsecured and therefore paid off at a fraction under the provisions of the bankruptcy plan. *See supra* notes 23, 30 and accompanying text.

[47] *See supra* notes 23, 30, 43 and accompanying text. Senior lienholders will receive a larger portion of their outstanding balances since debtors will be obligated to pay a higher percentage of their assets as the present value of the collateral. *See supra* notes 23, 30 and accompanying text. Logically, this results in less money for the debtors to pay off junior lienholders. *See supra* notes 23, 30, 43 and accompanying text.

[48] *See supra* notes 39-40 and accompanying text. The *Rash* decision equates fair market value and replacement cost, but other circuits have rejected this position. *See supra* notes 33, 39-40 and accompanying text.

[49] *See supra* notes 39-40 and accompanying text. Bankruptcy courts must determine on a case-by-case basis whether replacement cost will equal retail or wholesale value. *See supra* notes 39-40 and accompanying text.

[50] *See supra* note 40 and accompanying text. Bankruptcy courts are in the best position to make exact determinations concerning valuation of collateral after

IV. CONCLUSION

The *In re Rash* opinion clarifies the standard to be used when valuing property to be retained by a debtor under a bankruptcy reorganization plan and resolves a split within the circuits. This decision strengthens the position of undersecured creditors when dealing with debtors who seek to retain property by invoking the cram down provisions of the Code. Although the application of the replacement value standard will require further interpretation, the decision provides much needed guidance for lower courts.

Jennifer Gingery

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hearing evidence. *See supra* note 40 and accompanying text.

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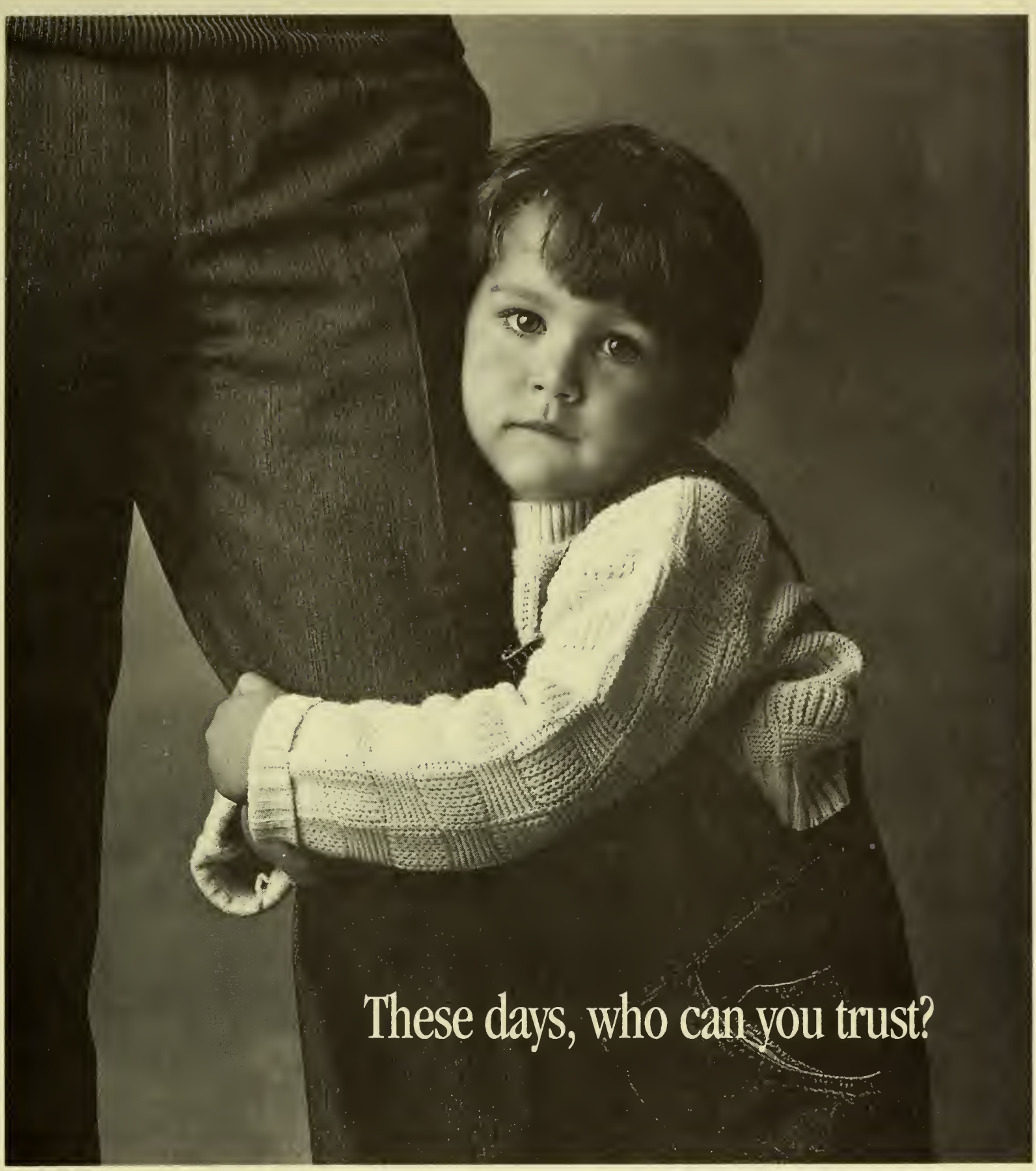

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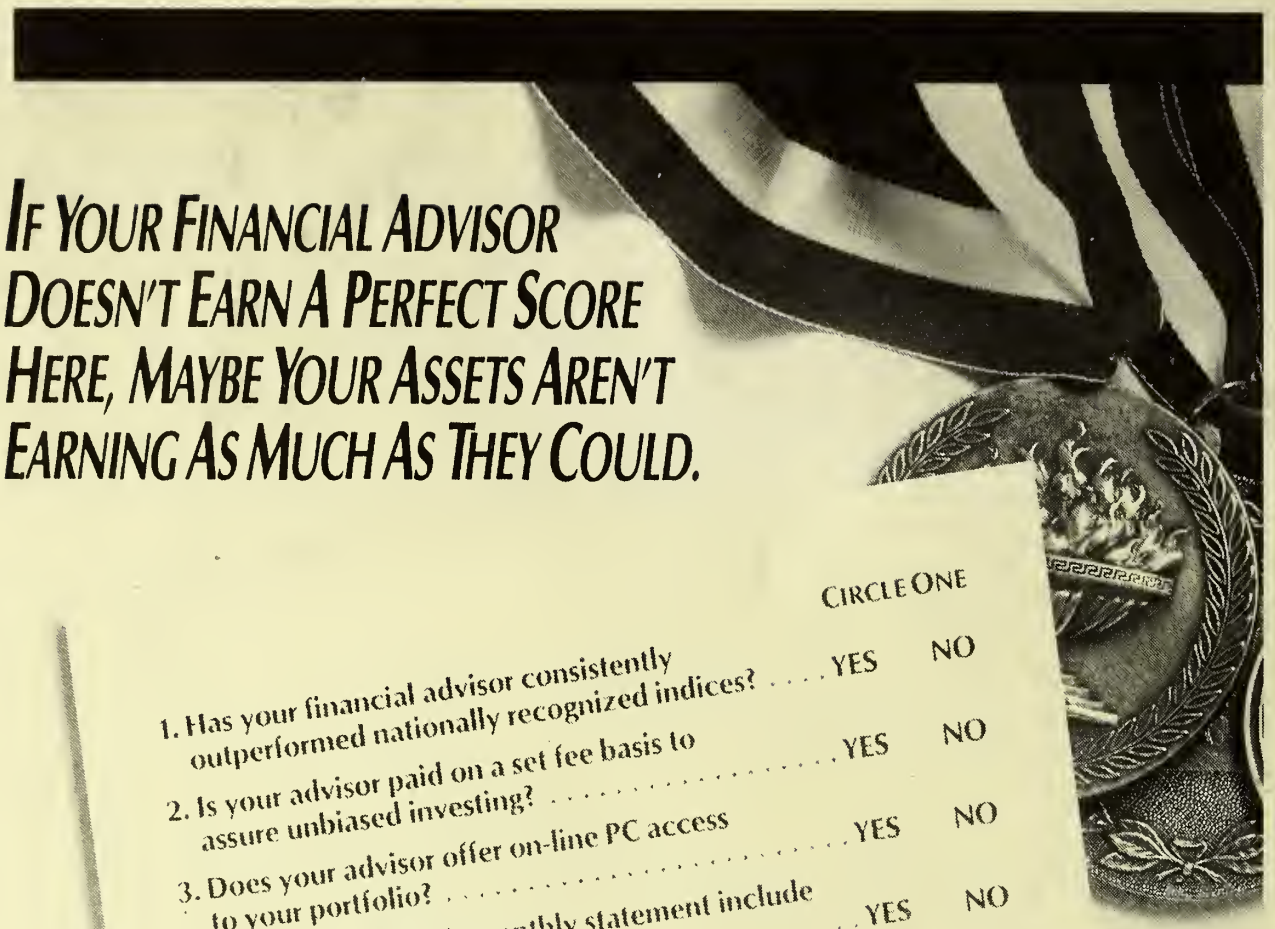

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